FILED
DEC 30 1991
OFFICE OF THE CLERK

91 1086

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1991

STATE OF ALABAMA,

PETITIONER,

V.

BRAD HAYWOOD SIMS,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT AND COURT
OF CRIMINAL APPEALS OF ALABAMA

OF

JAMES H. EVANS
ATTORNEY GENERAL

AND

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR PETITIONER

ADDRESS OF COUNSEL:

Office of the Attorney General
Criminal Appeals Division
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

STATEMENT OF ISSUES PRESENTED

1. In light of the Fourth Amendment's preference for warrants, may a state appellate court system maintain a policy of invalidating search warrants by a process of reading into affidavits on which warrants were issued false facts, which were not stated in the affidavits or communicated to the issuing magistrates and then invalidating the warrants on the basis of the falsity of such facts, where probable cause remains when the negation of such facts is read into the affidavits?

2. (A) Should a criminal conviction be reversed under Batson v. Kentucky, (476 U.S. 79 [1986]), without a determination that a prima facie case of racial discrimination has been made out or a finding of purposeful racial discrimination by the trial court?

2. (B) In a prosecution for unlawful distribution of drugs, does an appellate court err in ruling as a matter of law that

the fact that a venireperson resides in a neighborhood which has a high crime rate, particularly relating to drugs, is not a race neutral reason for striking venirepersons?

2. (C) Are the facts that venirepersons wear dark glasses indoors, chew gum in the courtroom, appear depressed and give hesitant responses to voir dire questions race neutral reasons for striking such persons?

THE PARTIES

In the Circuit Court of Montgomery County, Alabama, the Court of Criminal Appeals of Alabama, and the Supreme Court of Alabama, the parties were Brad Haywood Sims, who is Respondent herein, as Defendant, Appellant and Respondent, respectively, and the State of Alabama, who is Petitioner herein, as Plaintiff, Appellee, and Petitioner, respectively.

TABLE OF CONTENTS

	PAGE(S)
QUESTIONS PRESENTED.....	ante I
THE PARTIES.....	ante II
TABLE OF CASES.....	iii
TABLE OF CONSTITUTIONAL PROVISIONS.....	v
TABLE OF STATUTES.....	v
OPINION AND ORDERS BELOW.....	2
JURISDICTION.....	3
CONSTITUTIONAL PROVISIONS INVOLVED.....	3
STATUTORY PROVISIONS INVOLVED.....	5
STATEMENT OF THE CASE.....	5
STATEMENT OF THE FACTS.....	9
I. ON THE SEARCH WARRANT AFFIDAVIT.....	10
II. ON BATSON.....	14
SUMMARY OF THE ARGUMENT.....	20

TABLE OF CONTENTS (CONT'D)

PAGE(S)

ARGUMENT..... 23

I. IN RE: THE SEARCH WARRANT

REASON FOR GRANTING THE WRIT: CONFLICT WITH CONTROLLING OPINIONS OF THIS HONORABLE COURT..... 23

II. IN RE: Batson v. Kentucky (476 U.S. 79 [1986])

REASON FOR GRANTING THE WRIT: CONFLICT WITH THE CONTROLLING OPINIONS OF THIS HONORABLE COURT..... 38

A. THE THREE STEP PROCESS..... 38

B. RACE NEUTRAL REASONS..... 42

CONCLUSION..... 50

CERTIFICATE OF SERVICE..... 52

TABLE OF CASES

	PAGE(S)
Alabama v. Harrell ___U.S.___, 113 L.Ed 2d 736 111 S.Ct. 164 (1991).....	39-40
Batson v. Kentucky 476 U.S. 79, 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986).....	ante, I;post, 2,6,8,21 22,38-49
Chapman v. United States 365 U.S. 610, 5 L.Ed 2d 828, 81 S.Ct. 776 (1961).....	30
Ex parte Branch 526 So.2d 609 (Ala, 1987).....	39
Franks v. Delaware 438 U.S. 154, 57 L.Ed.2d 667, 98 S.Ct. 2674 (1978).....	23-37
Harrell v. State 571 So.2d 1270 (Ala, 1990).....	39,41
Harrell v. State 555 So.2d 263 (Ala, 1989).....	39,40-41
Harrell v. State 555 So.2d 251 (Ala. Cr. App, 1989).....	39
Hernandez v. New York 500 U.S.____, 114 L.Ed.2d 395, 111 S. Ct.1859, (1991).....	21,22 39-49
Illinois v. Gates 462 U.S. 213, 76 L.Ed.2d 527, 103 S.Ct. 2317 (1983).....	31,32

TABLE OF CASES (CONT'D)

	PAGE(S)
Johnson v. State 333 U.S. 10, 92 L.Ed 436, 68 S.Ct. 367 (1947).....	30
Jones v. State 362 U.S. 257, 4 L.Ed 2d 697, 80 S.Ct. 725 (1960).....	31
Massachusetts v. Sheppard 468 U.S. 981, 82 L.Ed.2d 737, 104 S.Ct. 3424 (1984).....	32
Massachusetts v. Upton 466 U.S. 727, 80 L.Ed.2d 721, 104 S.Ct. 2085 (1984).....	32
McDonald v. United States 335 U.S. 451, 93 L.Ed. 153, 69 S.Ct. 191 (1948).....	29
Sims v. State ___So.2d___ (Ala. Cr. App, June 14, 1991).....	2
United States v. Flagg 919 F.2d 499 (8th Cir, 1990).....	24,26
United States v. Karo 468 U.S. 705, 82 L.Ed.2d 530, 104 S.Ct. 3296 (1984).....	32
United States v. Leon 468 U.S. 897, 82 L.Ed.2d 677, 104 S.Ct. 3505 (1984).....	32
United States v. Salvucci 448 U.S. 83, 65 L.Ed 2d 619, 100 S.Ct. 2547 (1980).....	31
United States v. Ventresca 380 U.S. 102, 13 L.Ed.2d 684, 85 S.Ct. 741 (1965).....	28,30 33-36

TABLE OF CASES (CONT'D)

Villemez v. State
555 So.2d 342 (Ala. Cr. App, 1989).....23,24

TABLE OF CONSTITUTIONAL PROVISIONS

PAGE(S)

United States Constitution, 1787

Amendment Four, 1791..... ante, I; post, 9,34, 23-37,50

Amendment Fourteen, 1868.....3,4,50

TABLE OF STATUTES

Code of Alabama,, 1975,

Title 12, Section 12-16-100....5

Title 13A, Section 13A-12-211..5

United States Code,

Title 28, Section 1257.....3

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1991

STATE OF ALABAMA,

PETITIONER,

V.

BRAD HAYWOOD SIMS,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT AND
COURT OF CRIMINAL APPEALS OF ALABAMA

The State of Alabama, Your Petitioner, respectfully prays that a writ of certiorari issue to review the opinion and orders of the Supreme Court and Court of Criminal Appeals of Alabama in the above-styled cause.

OPINIONS AND ORDERS BELOW

The Circuit Court of Montgomery County, Alabama, issued no formal orders in overruling the Respondent's motion to suppress or his Batson[1] objection at the time of trial.

The opinion and order of the Court of Criminal Appeals of Alabama reversing the Respondent's conviction are not yet reported but will be reported as follows:

Sims v. State, ___So.2d___

(Ala. Cr. App, 1991)

A copy of the same is submitted in Appendix "A" hereto.

The order of the Court of Criminal Appeals of Alabama denying rehearing will be reported as part of the report of the Court's opinion, as set out above.

A copy of the same is submitted as Appendix "B" hereto.

---

[1]Batson v. Kentucky, 476 U.S. 79, 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986).

The order of the Supreme Court of Alabama denying certiorari review will be reported as part of the report of the Court of Criminal Appeals' opinion.

A copy of the same is submitted as Appendix "C" hereto.

JURISDICTION

The order of the Supreme Court of Alabama denying review was issued on October 4, 1991, and this petition is filed within ninety (90) days of said date. This Honorable Court's Jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Supreme Court and Court of Criminal Appeals of Alabama, believed that their decisions were mandated by the Fourth Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States. Your Petitioner is making a claim under the same said

provisions. Said constitutional provisions read:

"AMENDMENT IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

"AMENDMENT XIV

"Section 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS INVOLVED

No statutory provisions are at issue in this proceeding. The Respondent was indicted and convicted under Section 13A-12-211, Code of Alabama, 1975, and the jury was selected pursuant to Section 12-16-100 of the same Code. Copies of these statutes are submitted in Appendix "D" hereto.

STATEMENT OF THE CASE

The Respondent, Brad Haywood Sims, was indicted for unlawful distribution of a controlled substance more particularly described as cocaine, by the Grand Jury of Montgomery County, Alabama, at its October, 1989, Term. (R. Vol. XIV, pp. 2039-2040)

On November 21, 1989, the Respondent waived arraignment on the indictment and pleaded not guilty. (R. Vol. XIV, p. 2051)

The search and seizure issue raised by this petition was first raised by a motion to suppress evidence found pursuant to a search warrant which was filed in the Trial Court.

(R. Vol. XIV, pp. 2055-2070) A hearing was held on the same on December 8, 1989, and it was overruled. (R. Vol. XIV, p. 2055; Supp. R.)

On January 23, 1990, following an ealier mistrial, the cause came on for trial before Honorable Joseph D. Phelps, a Circuit Judge, and a jury. The Respondent was attended by his Attorneys, Honorable Julian McPhillips and Honorable Kenneth Shinbaum, and the State was represented by its District Attorney, Honorable James H. Evans and his Chief Deputy, Honorable Ellen Brooks, and Assistant, Honorable Bruce Lieberman. (R. Vol. IV, pp. 1 ff)

After the jury was struck but before it was empaneled, the Respondent made an objection under Batson v. Kentucky (476 U.S. 79, 90 L.Ed. 2d 69, 106 S. Ct. 1712 [1986]), thereby first raising the other issues presented by this petition. The Trial Judge,

without ruling the question of whether the Respondent had made out a prima facie case of racial discrimination, required the Prosecutor to state her reasons for her strikes, which she did. His Honor then overruled the Batson objection on the grounds that the Prosecutor had stated race neutral reasons for her strikes.[1] (R. Vol. IV, pp. 146-169) No further proceedings were held on the motion.

The jury, on hearing the evidence, argument of Counsel and charge of the Court, found the Respondent guilty of distributing cocaine as charged in the indictment. The Respondent was then adjudged guilty. (R. Vol. XIV, pp. 2035 and 2041)

On March 21, 1990, the Respondent was sentenced to ten (10) years imprisonment. In lieu thereof he was granted probation, after serving three years in prison. The Appellant was ordered to pay $25.00 to the

---

1. "...The Court will accept that explanation...." (R. Vol. IV, p. 169)

Alabama Victim's Crime Fund. (R. Vol. XIV, p. 236) Appeal followed.

On June 14, 1991, the Court of Criminal Appeals of Alabama reversed and remanded the case. The Court read int the search warrant affidavit facts which were not stated therein and then condemned as false such unstated facts and, thereby invalidated the warrant. In addition, the Court gave the Trial Court's ruling on the Respondent's Batson objection de novo review, did not treat the same as a credibility choice, as mandated by this Honorable Court, and reversed the Respondent's conviction, even though the Trial Judge had never ruled on two of the three steps of the Batson process. (Appendix "A")

The State applied for rehearing raising the matters herein presented and requested the finding of additional facts,

but the same were overruled and denied on July 26, 1991. (Appendix "B")

The State of Alabama, Your Petitioner, sought review by a writ of certiorari in the Supreme Court of Alabama, raising the issues herein presented and pointing out; (1) That the practice of reading false facts into search warrant affidavits and invalidating warrants on the basis of such facts, is contrary to the policy of the Fourth Amendment and the teachings of the Honorable Court and (2) that the Court of Appeals review of the Batson issue was in irreconcilable conflict with this Court's pronouncements on that subject. However, on October 4, 1991, the Alabama Supreme Court rejected your Petitioner's petition. (Appendix C)

STATEMENT OF THE FACTS

The evidence upon which the Respondent was convicted is not relevant to the issues

here presented and is submitted as Appendix "E" to this petition.

I.

ON THE SEARCH WARRANT AFFIDAVIT

The Court of Criminal appeals of Alabama ruled that the search warrant in this case was invalid, because it was issued on an affidavit which contained a false statement, namely, that the informer had entered the Respondent's house and observed a drug transaction. The affidavit did not, in fact, contain such a statement, and the unconflicting evidence is that the affiant officer did not intend to communicate such to the magistrate, and no evidence was offered at the hearing on the warrant that the magistrate understood that the informer had entered the house.

The information for the search warrant affidavit arose out of an investigation by the Montgomery Police Department, which was directed toward a

cocaine dealer know as "Miami." The idea was to have an informer make a controlled buy from Miami, using marked money.

On September 29, 1989, an informer, named Julius Moore, was given $600.00 in bills, whose serial numbers had been recorded, and sent out to find Miami. He did not succeed in locating Miami, but he did obtain the assistance of a second person in locating cocaine. This person led Moore to one Eric Johnson, who led the trio to 3437 South Perry Street. Johnson went into the house and returned with cocaine, which Moore inspected. Moore gave Johnson $400.00 in marked money, which Johnson took into the house. Johnson and the Respondent then came out to Moore's car, and the Respondent told Moore that he would have several ounces of cocaine the following day. (Supp.R. pp. 6-15)

The information so obtained was made the basis of a search warrant affidavit

executed the next day, which read in pertinent part as follows: —

> "...'That a confidential and reliable informant, hereinafter referred to as "A" observed a quantity of an off-white rocky substance which appeared to "A" to be 'crack' cocaine being stored in the residence located at 3437 Perry Street, Montgomery, Alabama, within the past seventy- two (72) hours...."
>
> "Further probable cause being that 'A' witnessed crack cocaine being sold out of the residence located at 3437 Perry Street during the month of September.
>
> "Further probable cause being that 'A' has given the affiant information in the past which has proven true through investigative means.
>
> "Further probable cause being that 'A' has assisted the Narcotics & Intelligence Bureau in numerous investigations which have resulted in numerous arrests.
>
> "Further probable cause being that the power for the residence at 3437 Perry Street is in the name of Brad Sims.
>
> "Further probable cause being that intelligence information obtained by Narcotics & Intelligence Bureau personnel indicates that Brad Sims is involved in illegal narcotics activity.

> "As Brad Sims is a member of the Montgomery Police Department and is therefore most likely armed at least with a Police Department issue 9mm automatic pistol, a no-knock clause is being requested in this warrant for officer safety.
>
> "The foregoing is based on personal knowledge of the affiant and on facts obtained by the Narcotics & Intelligence Bureau, Administrative Division, Montgomery Police...." (R. Vol. 14, pp. 2045; emphasis supplied)

The execution of the search warrant on September 30, 1989, led to the discovery of $932.00 hidden in a closet. Among the $932.00 in currency were $360.00 in bills which had originally been provided to Moore. (Supp. R.pp. 10-11)

The affidavit did not state that the informer ever went into the house, and the officer testified at the hearing that he used "stored at" in the first paragraph above, simply to mean "located at". (Supp. Trans. p. 13). At the hearing on the motion to suppress the

fruits of the search warrant, no evidence was offered that the warrant magistrate understood that the informer entered the residence at the time the warrant was issued.

II.

ON BATSON

The Trial Judge in this case never ruled on the issue of whether a prima facie case of a Batson violation had been made out; he responded to the Batson objection by immediately ordering the Prosecutor to state her reasons for strikes. He did, however, find that the Prosecutor had race neutral reasons for each of her strikes. The Court of Criminal Appeals ruled that the Trial Judge's action constituted an implied finding of prima facie case, reviewed the Trial Judge's findings on the racial neutrality of the strikes de novo, and rejected the Trial Judge's findings as to four of the prosecutor's strikes. In so doing, the Court of Appeals did not even

consider the whole evidence on these venirepersons.

The Court of Criminal Appeals found that four of the Prosecutor's strikes were pretextural. The reasons for these strikes as set out, by the Court of Criminal Appeals, were

> "...Juror number 81, [J.M.] lived on Early Street where the police had answered a call, and this particular neighborhood has been identified as a high crime area, in particular, drugs.
>
> "Juror number 25, [H.W.]. Our information there -- and I personally observed [H.W.] in court chewing gun, not only during individual voir dire, but during the general voir dire. She was extremely soft-spoken, and it was extremely difficult for me to hear. She was very hesitant in her responses to the question, in particular to the question I asked about what she had heard and what was her opinion about any prior proceedings. My opinion was that she did not want to discuss that, and

perhaps, had further knowledge she did not divulge.

"Juror number 19, Ms. [R.B.]. [R.B.'s] attitude appeared to be extremely sad. I was concerned about her desire to be of service in this court. She had a very depressed look about her face. Further, Officer Jones identified her home area of Riviera Road as being that of a high crime area, in particular, drugs.

"Juror number 75, Ms. [C.]. Ms. [C.] indicated she -- or did not indicate that she heard anything about this case. She came to court, and the best judgment I could make Your Honor, she sat towards the middle rear. She had glasses on. They appeared to be darkly tinted. I could not tell if it was for [medical] reasons or if it was because she had worn sunglasses in the courtroom. Because of the numerous exhibits and documents, blow-ups, and other things, I could not take a chance on whether or not she had a vision problem, or contrary to most people, wore sunglasses indoors." (Appendix "A", pp. 15-16)

Said statements fall short of what was before the Trial Judge and which is shown by the record, with regard to jurors nos. 25 and 19. The complete statement of the prosecutor's reasons for striking these persons were:

> The State struck juror 25, Hester Webb. Our information there -- and I personally observed Ms. Webb in court chewing gum, not only during individual voir dire, but during the general voir dire. She was extremely soft-spoken, and it was extremely difficult for me to hear. She was very hesitant in her responses to the question, in particular to the question I asked about what she had heard and what was her opinion about any prior proceedings. My opinion was that she did not want to discuss that, and perhaps, had further knowledge she did not divulge. <u>This case is very complicated and will require close attention and understanding of some very what we think are subtle differences in the case about whether or not someone's involvement in this case and their involvement in any audit or other activity is relevant."</u> (R. Vol. IV, pp. 154-155; emphasis supplied.)

And:

> "...We struck juror number 19, Ms.Rosa Bush. Ms. Bush's attitude appeared to be extremely sad. I was concerned about her desire to be of service in this court.
>
> "THE COURT: Extremely what?
>
> "MS. BROOKS: Sad, She had a very depressed look about her face. Further, Officer Jones has identified her home area of Riviera Road as being that of a high crime area, in particular, drugs. <u>These officers I'm mentioning, Your Honor, Jones and Wooten and others, that we personally reviewed this list with, work primarily in narcotics. However, some of them worked for years in the area of patro', so they are very familiar with this particular area...."</u> (R. Vol. IV, p. 155; emphasis supplied.)

In addition, the Court of Criminal Appeals observed:

> "Several of the reasons that the prosecutor gave for striking prospective jurors were that they lived in high crime areas. See above for reasons given for striking jurors numbers 81 and 19. (We note that one white

> juror who served on the jury was from a neighborhood with higher crime rate than the average neighborhood in Montgomery.)" (Appendix "A" p. 17)

Not mentioned by the Court of Criminal Appeals was the fact that the venire person referred to in the above quoted sentence was Mrs. Elise E. Mitchell, No. 52. The record shows that the Prosecutor wanted to retain Mrs. Mitchell on the jury, because she was a friend of a retired, very highly respected Montgomery Police Chief. (R. Vol. IV, pages 165-166) The record shows that the prosecutor also strove to keep Mrs. Mordean, No. 16, on the jury, because Mrs. Mordean is the mother of a police officer known and respected by the Prosecutor. Mrs. Mordean is black. (R. Vol. IV, p. 165)

SUMMARY OF THE ARGUMENT

1. One of the most fundamnental policies under the Fourth Amendment is the policy favoring searches under judicial supervision through the warrant process. This policy, as developed over the years by the Court, has both a negative aspect, under which evidence found in unexcused warrarntless searches is suppressed, and a positive aspect, under which searches pursuant to warrants are greatly favored. The Alabama policy of invalidating search warrants on the basis of false facts, read into search warrant affidavits, which are not stated, intended to be expressed or understood by the issuing magistrate, discourages the use of the warrant process by putting officers who seek search warrants at the risk of being publicly declared perjurers on the basis of facts they never intended to express.

2. (A) Contrary to the clear directives of this court in Batson v.Kentucky (476 U.S. 79, 96-98, 90 L.Ed. 2d 69, 87-88, 106 S.Ct. 1712 [1986]) and Hernandez v. New York (500 U.S. ___, 114 L.Ed. 2d 395, 405, 111 S. Ct. 1859, 1865-1866 [1991]), the Alabama appellate courts have ignored the three-step process. As a result, the conviction in the instant case was reversed without any court ever ruling on whether a prima facie case of racial discrimination was made out or a determination of whether the defendant made out a case of purposeful discrimination

2.(B) In treating the issue of the racial neutrality of the prosecutor's reasons for her strikes as one of law rather than fact, in failing to treat the matter as a credibility choice by the judge who presided at trial, in giving no deference to the Trial Judge's decision and in failing to consider all of the factors

which were before the Trial Judge, the Alabama appellate courts ruled contrary to this Court's clear teachings in Batson v. Kentucky, above, and Hernandez v.New York, above.

ARGUMENT

I

IN RE: THE SEARCH WARRANT

REASON FOR GRANTING THE WRIT:
CONFLICT WITH THE CONTROLLING
OPINIONS OF THIS HONORABLE COURT

The Court of Criminal Appeals of Alabama invalidated the search warrant in this case because the affidavit allegedly contained a statement which was willfully false or made with a reckless disregard for the truth, namely: That the informer had gone into the Respondent's house and observed a drug transaction. But, the affidavit, in fact, contained no such statement. In so holding, the Court followed its own earlier decision in Villemez v. State (555 So. 2d 342 [Ala. Cr. App, 1989]) and claimed to be following this Honorable Court's opinion in Franks v. Delaware (438 U.S. 154, 57 L.Ed. 2d 667, 98 S. Ct. 2674 [1978]). In fact, the Court of Appeal's decision in this case is in irreconcilable conflict with Franks, as well

as all of this Court teachings on review of search warrants, as we will discuss below. However, the Court of Appeal's decision was, indeed, an extension of Villemez. In Villemez the Court of Appeals invalidated a search warrant because the affidavit stated that an "...informant relayed to me...." (555 So. 2d 342, 343) certain information. This statement was held to be willfully false, because the informant had given the information to a fellow officer of the affiant, who relayed it to the affiant officer, who executed the affidavit. In Villemez the Court did not explain why "relayed to me" was a false statement of the facts, nor why any inaccuracy in the language was material, since the incorporation of the full facts would not have defeated probable cause. See, for example, United States v. Flagg 919 F. 2d 499, 500-501 (8th Cir, 1990). In the instant case, the Court of Appeals extended Villemez considerably. The officer used the language "...being stored in ..." to mean "...located at..." in the first paragraph of the affidavit.

Apparently the Court of Appeals implied from that language a claim that the informer had entered the Respondent's residence, even though the officer intended no such understanding and no evidence was offered that the magistrate so understood the affidavit. Had the Court of Appeals rejected this paragraph alone, we would probably not be here, since the remaining seven paragraphs clearly set out probable cause, but the Court also rejected the second paragraph, which read:

> "...Further probable cause being that 'A' witnessed crack cocaine <u>being sold out of</u> the residence located at 3437 Perry Street during the month of September...." (Emphasis supplied)

This paragraph was absolutely true, and, not only does it not state or imply that the informer went into the house, it indicates an outside observance. It does not claim that the informer observed the exchange of money or drugs. Yet, without explanation, the Court of Criminal Appeals found that this statement was false, because the informer did not go into the house. The

Court found these "false statements" material. Yet, if the affidavit, with or without the first paragraph, were, "...supplemented by the omitted information,..." (United States v. Flagg, above, 919 F.2d 499, 501) that the informer did not go into the Respondent's house. The affidavit would still have supported probable cause. The policy established by the Alabama Appellate Courts in Villemez and expanded in this case puts Alabama police officers, who obey the mandate of the Federal Constitution by pursuing the warrant process, in the position of being pilloried as perjurers on the basis of false statements read into their affidavits, which they neither expressed nor intended to express.

In Franks v. Delaware, (438 U.S. 154, 57 L. Ed. 667, 98 S. Ct. 2674 [1978]), this Honorable Court confronted a problem, which created a possible conflict between the integrity and the efficacy of the warrant

process. On the one hand, if a warrant could be issued on the basis of intentional falsehoods, then the process would become a mere sham and the purpose of the process, the protection of citizens, would be defeated. Warrants could be issued on the basis of mere fictions, without any basis in fact, and patently unreasonable searches would be rendered "reasonable" as a matter of law on the basis of perjury. The same result would flow from an absolute bar on any examination of the truthfulness of affidavits. On the other hand, if mere errors in grammar or vocabulary, negligent draftsmanship, or honest mistakes voided warrants, the warrant process would soon degenerate into the sort of technical nightmare that common law pleading became and probably doom the warrant process to the same repudiation that befell common law pleading. The immediate effect of such a policy would be to discourage officers from resorting to the warrant process. This

problem had already been recognized by this Court more than a dozen years before Franks in United States v. Ventresca (380 U.S. 102, 13 L.Ed. 2d 684, 85 S. Ct. 741 [1965]). In condemning the giving of hypertechnical readings to search warrant affidavits, this Court wrote:

> "...Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting...." (380 U.S. 102, 108, 13 L.Ed.2d 684, 689)

In Franks this Court held that willfully false statements and those made with a reckless disregard for the truth void warrants, if such statements are necessary to probable cause. However the Court made it clear that, "...allegations of negligence or innocent mistakes are insufficient ...", (438 U.S. 154, 172, 57 L.Ed.2d 667, 682), to

even require a hearing. Franks is a sound and easily applied rule, which has been effective in preventing the evils it addressed, while placing little additional burden on the police or the lower courts, except, of course, in Alabama.

One of the fundamental principles of the Fourth Amendment is that searches ought to be subject to judicial control through the warrant process. Indeed, a warrantless search, even if justified by probable cause, is unlawful, unless the lack of a warrant is excused. McDonald v. United States 335 U.S. 451, 93 L.Ed. 153, 69 S. Ct. 191 (1948) This Court has often condemned searches, which it found to be justified by probable cause, solely because the evidence establishing probable cause was not presented to a magistrate and a warrant obtained before the search was undertaken. E.g. Johnson v. United States 333 U.S. 10, 13-14, 92 L.Ed. 436, 440, 68 S. Ct. 367

(1947); Chapman v. United States 365 U.S. 610, 5 L.Ed. 2d 828, 81 S. Ct. 776 (1961) "...The reasons for this rule go to the foundations of the Fourth Amendment...." United States v. Ventresca, above, 380 U.S. 102, 106, 13 L.Ed. 2d 684, 687. In applying the Fourth Amendment's policy favoring warrants, this Court has fashioned rules which penalize the unexcused failure to procure search warrants, but the Court has been equally vigorous in condemning policies which unnecessarily burden the warrant process. Such policies are condemned because they discourage resort to warrants.

> "...If the affidavits submitted by police officers are subjected to the type of scrutiny some courts have deemed appropriate, police might well resort to warrantless searches, with the hope of relying on consent or some other exception to the Warrant Clause that might develop at the time of the search...." (Illinois v. Gates 462 U.S. 213, 236, 76 L.Ed. 2d 527, 547, 103 S. Ct. 2317 [1983])

Compare Jones v. United States 362 U.S. 257, 270, 4 L.Ed. 2d 697, 708, 80 S. Ct. 725 (1960)[2]. The policy favoring searches pursuant to warrants has, then, both a negative aspect, i.e. the suppression of evidence obtained by officers on their own authority without a legally sufficient excuse, and a positive aspect, which strongly backs the officer who procures a warrant. It is this positive aspect of the warrant policy which the Alabama Appellate Courts ignored in this case and Villemez.

In effectuating the positive aspect of the policy preferring warrants, this Court has established more lenient proceedings for reviewing searches pursuant to warrants. These include: Placing a heavy burden on a party who would attack a search warrant and forbidding de novo review of

---

2 Jones was overruled on an unrelated point in united States v. Salvucci 448 U.S. 83, 85, 65 L.Ed. 2d 619, 624, 100 S. Ct. 2547 (1980)

warrants (Illinois v. Gates, above, 462 U.S. 213, 236, 76 L.Ed.2d 527, 546-547; Massachusetts v. Upton, 466 U.S. 727, 80 L. Ed. 2d 721, 104 S. Ct. 2085 [1984]); holding that when willfully false statements or other improper materials are included in warrant affidavits, the warrants are to be upheld unless the improper material is necessary for probable cause (Franks v. Delaware, above, 438 U.S. 154, 171-172 57 L.Ed. 2d 667, 682; United States v. Karo 468 U.S. 705, 719-720, 82 L.Ed. 2d 530, 544-545, 104 S. Ct. 3296 [1984]) and upholding searches undertaken by officers in good faith reliance on even defective search warrants. United States v. Leon, 468 U.S. 897, 82 L.Ed.2d 677, 104 S.Ct. 3405 (1984); Massachusetts v. Sheppard, 468 U.S. 981, 82 L.Ed.2d 737, 104 S.Ct. 3424 (1984).

Of particular relevance here is the prohibition against giving search warrant affidavits hypertechnical readings. As the Court wrote in Ventresca above,

"...If the teachings of the

> Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a common sense and realistic fashion. They are normally drafted by non-lawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting...." (380 U.S. 102, 108, 13 L.Ed.2d 684, 689; emphasis supplied)

"...[E]laborate specificity...." exactly describes what the Alabama appellate courts are demanding of police officers who submit search warrant affidavits. In this case the affidavit was described as false, because the Court believed certain facts were implied, and these facts were not negated in the affidavit. (Appendix "A", pp. 4-5) In Ventresca, the Court was concerned with officers being frustrated when their

recitations of probable cause were rejected on technical grounds. But, lawyers, judges and legal scholars have difficulties with both probable cause and the rules of pleading. Having his affidavit rejected on technical grounds might be frustrating to an officer but it would be no more personally embarrassing to an officer than a lawyer's having his complaint dismissed on technical grounds. Franks v. Delaware, above, is by its very terms limited to intentional falsehoods and reckless disregard for the truth, in short, the sort of lies which would provide a basis for a perjury prosecution or a libel judgement. Anyone can misjudge probable cause; anyone can err on a pleading point, but no one has to lie. But, an Alabama officer who submits an affidavit for a search warrant, does so at the risk that at some point, a judge or appellate court may read into his or her affidavit false facts, which the officer did not express or intend to communicate and which the magistrate did not understand, and

then find himself or herself publicly declared a perjurer. Such will obviously have a gravely negative impact on the warrant process in Alabama. This policy established by the Alabama Appellate Courts is in clear contradiction of the Federal Constitution as interpreted by this Honorable Court.

In this case the officer had and recited in the affidavit a solid basis for believing the informer. He clearly attempted to relate in the affidavit the facts which he believed to be true on the basis of the informer's information and which, in fact, were true. There is no basis to even question these propositions. To be sure, the affidavit would never win an essay contest. After all, it was, "...drafted by [a] non-lawyer...in the midst and haste of a criminal investigation...." United States v. Ventresca, above, 380 U.S. 102, 108, 13 L.Ed.2d 684, 689. But, it cannot be disputed that the affiant officer

had certain facts and attempted to relate them in the affidavit. The affidavit was, therefore, truthful.

If the Court of Criminal Appeals thought that the words "...being stored in..." in the first paragraph implied that the informer went into the house, it could have either dropped those words from the affidavit or supplemented the affidavit with the fact that the informer did not go into the house, and then read the affidavit for probable cause. This is what is required by Franks v. Delaware, above, 438 U.S. 154, 171-172, 57, L.Ed. 2d 667, 682. In either case, probable cause would have remained. However, in reading into the second paragraph of the affidavit a fact which the language of that paragraph negated, the court went beyond the bounds of the after-the-fact warrant review allowed by the Fourth Amendment under this Honorable Court's opinions in Illinois v. Gates, above, and other cases.

The purpose of the Fourth Amendment's policy favoring warrants is the protection of citizens. The purpose of the rules formulated by this Honorable Court in pursuit of that policy is to insure that a warrant will be sought before a search is undertaken whenever such is possible. In this regard, the positive rules supporting officers who seek warrants are more effective than the negative rules which condemn officers who do not. The negative rules tend to encourage officers to look for excuses not to obtain a warrant; they encourage evasion and pretexturality. The positive rules, however, have the opposite effect and tend to encourage officers to go for warrants when it is possible to do so, even when there is a good excuse for proceeding without a warrant. But, the risks created for Alabama officers by the policy followed by the Alabama Appellate Courts negates the positive aspect of the Fourth Amendment's policy. For all of these reasons, the writ should issue.

II.
IN RE: BATSON V. KENTUCKY (476 U.S. 79 [1986])

REASON FOR GRANTING THE WRIT: CONFLICT WITH THE CONTROLLING OPINIONS OF THIS HONORABLE COURT

A.

THE THREE-STEP BATSON RPOCESS

In Batson v. Kentucky (476 U.S. 79, 90 L.Ed. 2d 69, 106 S. Ct. 1712 [1986]), this Honorable Court ruled that a criminal defendant is denied equal protection of the laws if the prosecutor practiced racial discrimination in striking the jury. In Batson, this Court set up a three-step process by which this issue is to be decided. Batson v. Kentucky, above, 476 U.S. 79, 96-98, 90 L.Ed. 2d 69,87-88. The three steps are: (1) The defendant must establish a prima facie case of racial discrimination by the prosecution. If that is done, (2) the prosecutor must advance race neutral for his or her strikes. Then, (3) the trial judge must determine if the

defendant has established purposeful discrimination. In Batson, this Honorable Court pointed out that this was basically an evaluation of credibility which is due "...great deference...." on review. Batson, note 21, 476 U.S. 79, 98, 90 L.Ed. 2d 69, 89. All of these principles were reaffirmed this year in Hernandez v. New York (500 U.S.___, 114 L.Ed. 2d 395, 405, 111 S. Ct. 1859, 1865-1866 [1991]) In a number of appellate opinions allegedly aimed at "clarifying" Batson, the Alabama appellate courts have created such a state of confusion over this Court's decision that two of the three steps outlined by this Honorable Court have no practical application in Alabama. Ex parte Branch 526 So. 2d 609 (Ala, 1987); Harrell v. State 555 So. 2d 251, 262 (Ala. Cr. App, 1989); writ quash. 555 So. 2d 263 (Ala, 1989) (Harrell, I); Harrell v. State 571 So. 2d 1270 (Ala, 1990); cert. den. ___U.S.___, 113 L.Ed. 2d

736, 111 S. Ct. 164 (Harrell II) These cases clearly demonstrate that the Alabama appellate courts do not consider the three-step Batson process to be a fact finding process, as mandated by this Court. These cases represent efforts to define, as a matter of law, what is a prima facie case and what is a race neutral reason for striking a venireperson. The Alabama Courts have never commented on the third Batson step. In addition, the Alabama appellate courts do not follow the rules laid out in these cases consistently. For example, in the instant case and many others, the Alabama Courts have held that the failure of a trial judge to rule on prima facie case, before asking the prosecutor to state his or her reasons for their strikes constitutes an implied finding of prima facie case (Appendix "A", p.14). Yet, in Harrell I, above, the Alabama Supreme Court found that the trial judge's actions indicated a finding that no prima facie case had been

made out.[3] (555 So. 2d 263, 265). Nonetheless, the Court ordered the case remanded for the trial court to determine prima facie case.

All of this has created such a level of confusion that Alabama trial judges automatically react to Batson objections with an order to the prosecutor to state his or her reasons. This is what happened here. In Alabama, a prima facia case under Batson consists of a Batson objection.

In the instant case, the Trial Judge never ruled on the issues of prima facie case nor the ultimate question of purposeful racial discrimination. Since the Trial Judge found the reasons advanced by the Prosecutor to be race neutral, this was

---

[3]In Harrold, a black prosecutor struck both blacks and whites from the venire. The resulting jury had a greater percentage of blacks than the venire. However, it was ultimately ruled by the Alabama Courts that the prosecutor had practiced racial discrimination against blacks. See Harrold II, above.

harmless error. Hernandez v. New York, above, 114 L.Ed. 2d 395, 405, 111 S. Ct. 1859, 1866. But, since the Court of Criminal Appeals found that His Honor had erred with regard to several of the strikes, the error became harmful and, assuming the correctness of the Court of Criminal Appeal's ruling, this cause should have been remanded for the other two steps of the Batson process, as formulated by the Honorable Court.

The decisions and opinion of the Alabama Appellate Courts in the case and the policy which it represents cannot be reconciled with the controlling opinions of this Honorable Court. For this reason, the writ should issue.

B.

RACE NEUTRAL REASONS

The only issue addressed by the Alabama Courts was the racial neutrality of the Prosecutor's reasons for her strikes. In accord with the policy of the Alabama

appellate courts, which we discussed in the previous sub-section, this was treated as an issue of law, not a credibility choice as mandated by this Honorable Court. Batson v. Kentucky, note 21, 476 U.S. 79, 98, 90 L.Ed. 2d 69, 89, 106 S. Ct. 1712 (1986); Hernandez v. New York 500 U.S.___, 114 L. Ed. 2d 408-410, 111 S. Ct. 1859, 1868-1870 (1991) This is clearly demonstrated by the language of the Court of Appeals.

The Court of Criminal Appeals' summary analysis of the alleged need to reverse this conviction was as follows:

> "As stated above, this Court may reverse the trial court's determination that the state's peremptory challenges were not motivated by intentional racial discrimination only if the trial court's determination was "clearly erroneous". Mitchell, ___ So.2d at ___; Branch, 526 So.2d at 625. The United States Supreme Court recently stated in Powers v. Ohio, ___ U.S. ___, 111 S.Ct. 1364, 112 1.Ed.2d 411 (1991), that:

> 'A prosecutor's wrongful exclusion of a juror by a race-based peremptory challenge is a constitutional violation committed in open court at the outset of the proceedings. The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation to the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause.'
>
> "Powers, ___ U.S. ___, 111 S.Ct. at ___.
>
> "We find therefore, that the prosecutor's challenges of the above veniremembers was so racially discriminatory and that it so tainted the proceedings that the appellant's right to equal protection was denied and he did not receive a fair trial. Accordingly, the trial court erred in denying appellant's Batson motion....' (Appendix "A", pages 21-11; emphasis supplied.)

Notice the Court of Appeals proceeds directly from the quotation of Powers to the conclusion that the case must be reversed as a matter of law. But under Batson and, under Hernandez, the issues are factual and

the racial neutrality of a prosecutor's reasons are issues of credibility - i.e. whether the trial judge was justified in believing the prosecutor. This error of the Court of Criminal Appeals permeates the Court's entire opinion on this point. It explains why the Court of Criminal Appeals felt justified in ignoring the fact that the Trial Judge could see and hear the Prosecutor, as she stated her reasons, see and hear the matters to which the Prosecutor referred (e.g. Juror No. 19's depressed look, Juror 25's hesitance in her responses, and Juror No. 75's dark glasses.) and would be familiar with conditions in Montgomery County. It also explains why the Court of Appeals saw no need to consider all of the factors recited by the prosecution for striking certain jurors and not striking others.

Two of the four venirepersons allegedly improperly struck by the Prosecutor were struck because they lived in "high crime

areas particularly for drugs". The Court of Appeals found that these reasons were not race neutral as a matter of law on authority of a court case and because an unstruck venirewoman came from a neighborhood with a higher than average crime rate.[4] (Appendix "A", p. 17) This later point is a good example of the Court of Criminal Appeals' narrow concern for reasons to find against this particular female prosecutor. The Prosecutor did not strike the venirepersons in question because of a higher than average crime rates in their neighborhood but because of high crime rates, particularly for drugs. This was, after all, a drug case.[5] In addition, the Court of

---

4 It does not appear where the Court of Appeals got this information.

5 In addition to the fact that such persons would be likely to be involved with drugs or have personal relationships with persons who are involved with drugs, people who live in such areas would be more likely to fear retribution for convicting a drug dealer.

Criminal Appeals ignored the fact that there was a strong positive reason for retaining the venireperson from the alleged higher than average crime rate neighborhood - she knew a respected former police chief.

The Court of Appeals also found that striking Juror No. 75, because her dark glasses might indicate a medical condition, was not race neutral. The Court of Appeals ruled that the Prosecutor should have asked the lady about her condition. But, questioning people about their medical conditions can embarrass them and create resentment. The Prosecutor might have ended up with a juror who not only could not see but who also resented the prosecution. In addition, where is it written that a prosecutor has to credit a venireperson's responses at face value?

The Court of Appeals did not explain why Juror No. 25's chewing gun, hesitant responses and suspected non-disclosure of facts were not race neutral. Similarly, the

Court did not explain why Juror No. 19's apparent depression was not race neutral.

The fact is that living in a high drug crime area, wearing dark glasses indoors, chewing gum in the courtroom, hesitant responses, possible non-disclosure of facts and apparent depression are not factors identified with any race. This Honorable Court in Hernandez v. New York, above, defined a race neutral reason as follows:

> "A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." 114 L.Ed. 2d 395, 406, 111 S. Ct. 1859, 1866)

At issue in Hernandez was whether a person's being bilingual in Spanish and English was

race neutral as to Hispanics. This Honorable Court ruled that it was in the context of that case. Under this standard the Prosecutor's reasons in this case were race neutral, and the Court of Criminal Appeals erred to reversal in ruling otherwise. However, the primary error of the Alabama appellate courts was in treating this issue as one of law instead of fact, as mandated by this Honorable Court's clear opinions on the subject.

For this reason, the writ should issue in this case.

CONCLUSION

In conclusion your Petitioner, the State of Alabama, respectfully submits that in this case the Court of Criminal Appeals and Supreme Court of Alabama, decided important questions under the Fourth and Fourteenth Amendments in a manner which conflicts sharply with the teachings of this Honorable Court. In addition, the policies established and followed by the Alabama appellate courts are contrary to the purposes of the policies established by this Court.

Therefore, Your Petitioner prays that this Honorable Court will issue the writ of certiorari and will review the matters complained of and reverse the decisions of

the said appellate courts of Alabama.

Respectfully submitted,

JAMES H. EVANS
ATTORNEY GENERAL
BY:

_____
JOSEPH G.L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR THE
PETITIONER

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, hereby certify that on this _____ day of December, 1991, I did serve the requisite number of copies of the foregoing on the Attorney* for Brad Haywood Sims, Respondent, and his former attorneys** by mailing the same to said Attorneys first class postage prepaid and addressed as follows:

Honorable Thomas M. Goggans*
Attorney at Law
Post Office Box 1307
Montgomery, Alabama 36101

Honorable Julian L. McPhillips** and
Honorable Kenneth J. Shinbaum**
Attorneys at Law
P. O. Box 64
Montgomery, Alabama 36101

_____
JOSEPH G.L. MARSTON, III
ASSISTANT ATTORNEY
GENERAL OF ALABAMA

ADDRESS OF COUNSEL:

Office of the Attorney General
Criminal Appeals Division
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

0289H

Supreme Court, U.S.
FILED
DEC 30 1991
OFFICE OF THE CLERK

91 1086

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1991

STATE OF ALABAMA,

PETITIONER,

V.

BRAD HAYWOOD SIMS,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT AND COURT
OF CRIMINAL APPEALS OF ALABAMA

APPENDIX TO THE PETITION

OF

JAMES H. EVANS
ATTORNEY GENERAL

AND

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR PETITIONER

ADDRESS OF COUNSEL:

Office of the Attorney General
Criminal Appeals Division
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

TABLE OF APPENDICIES

PAGE(S)

APPENDIX A, OPINION OF THE COURT OF CRIMINAL APPEALS OF ALABAMA..... 1

APPENDIX B, ORDER OF THE COURT OF CRIMINAL APPEALS OF ALABAMA ON REHEARING..... 24

APPENDIX C, ORDER OF THE SUPREME COURT OF ALABAMA DENYING CERTIORARI..... 26

APPENDIX D, RELEVANT ALABAMA STATUTES..27

TITLE 12, SECTION 12-16-100.....27

TITLE 13A, SECTION 13A-12-211...32

SECTION 13A-12-15....32

TITLE 20, SECTION 20-2-23.....33

APPENDIX F, FACTS PROVEN AT TRIAL.....34

CERTIFICATE OF SERVICE.....37

APPENDIX A

[RELEASED: JUNE 14, 1991]

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1990-91

CR-89-342

Brad Haywood Sims

v.

State

Appeal from Montgomery Circuit Court
(CC-89-2098-PH)

TAYLOR, JUDGE

The appellant, Brad Haywood Sims, was convicted of distributing a controlled substance, cocaine, in violation of 13A-12-211, Code of Alabama 1975. He was sentenced to 10 years in prison. The sentence was split, with three years to be served in prison and the remainder on probation. The instant appeal is the result of the appellant's second trial. The appellant's first trial ended in a mistrial with the jury unable to reach a verdict.

The evidence tended to show that as a result of a search warrant executed on the appellant's house, $360.00 in marked bills was discovered. These bills had been given to a confidential informant so that he could purchase cocaine. A total of $932.00 was recovered from the appellant's home. The appellant raises eight issues on appeal. However, since this case must be reversed, we address those issues which merit a reversal.

I

The appellant initially contends that the trial court erred in not suppressing the evidence recovered in his home since his home was searched as a result of a warrant, which, he argues, contained false statements in the affidavit supporting the warrant. The affidavit accompanying the warrant reads as follows:

> "That a confidential and reliable informant, hereinafter referred to as 'A' observed a quantity of an off-white rocky substance which appeared to 'A' to be 'crack' cocaine being stored

in the residence located at 3437 Perry Street, Montgomery. Alabama. within the last seventy-two (72) hours.

"Further probable cause being that 'A' witnessed crack cocaine being sold out of the residence located at 3437 Perry Street during the month of September.

"Further probable cause being that 'A' has given the affiant information in the past which has been proven true through investigative means.

"Further probable cause being that 'A' has assisted the Narcotics & Intelligence Bureau in numerous investigations which have resulted in numerous arrests.

"Further probable cause being that the power for the residence at 3437 Perry Street is in the name of Brad Sims.

"Further probable cause being that intelligence information obtained by Narcotics & Intelligence Bureau personnel indicates that Brad Sims is involved in illegal narcotics activity.

"As Brad Sims is a member of the Montgomery Police Department and is therefore most likely armed with at

> least a Police Department issue 9mm automatic pistol, a no-knock clause is being requested in this warrant for officer safety.
>
> "The foregoing is based on personal knowledge of the affiant and on facts obtained by the Narcotics and Intelligence Bureau, Administrative Division, "Montgomery Police Department....

The appellant maintains that Officer Lay, who executed the affidavit in support of the warrant, made several misrepresentations to the magistrate in order to obtain the warrant. The appellant contends that the sections of the affidavit underlined above were false. Specifically, he cites Lay's testimony at the suppression hearing in which Lay stated that the confidential informant, Julius Moore, stayed in the car and never went into the Sims residence. Lay further stated at the suppression hearing that the informant did not witness any drug transaction because he remained in the car. The appellant contends that the informant did not have any

personal knowledge of the facts testified to in the affidavit and that the informant was relying on information supplied to him by another individual, Eric Johnson, who the appellant identifies as a known drug dealer. This fact was not stated in the affidavit or told to the magistrate.

The following occurred during the cross-examination of Officer Lay:

> "Q [Defense Counsel] - Now, isn't it true that Julius Moore stayed out in the car and never went into the home of Brad Sims during the time of this so-called transaction between Eric Johnson and Brad Sims?
>
> "A - Yes, sir.
>
> "....
>
> "Q - Isn't it true, sir, that Julius Moore told you that he stayed out in the car during the time that Eric Johnson went in to see Brad Sims about drugs?
>
> "A - Yes, sir.
>
> "Q - Were you also within the area at the time the red Saab driven by Julius Moore was waiting outside?

"A - No, sir.

....

"Q - He didn't see any drugs either at the house or outside the house -- Let me rephrase it. Isn't it true Julius Moore, whom you have identified as A, never observed any drugs, crack or any substance, being stored in the residence at 3437 Perry Street?

"A - No, sir. He did not go in the residence. "....

"Q - Isn't it true, sir, that Julius Moore never personally saw Eric Johnson hand any money to Brad Sims?

"A - Yes, sir...."

The United States Supreme Court, in Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), recognized the importance of the veracity of the statements made in the affidavit to support a search warrant. "The Achilles' heel of any warrant is the presence of porobable cause for the same; and this, in turn, can be resolved only by resort to the supporting affidavit...." E. Mascolo, Impeaching the Credibility of Affidavits for Search

Warrants: Piercing the Presumption of Validity. 44 Conn. Bar. J. 9 (1970). "The veracity of the assertions supporting probable cause is integral to the criminal justice system." United States v. Cortina. 630 F.2d 1207, 1213 (7th Cir. 1980). The warrant clause itself takes the affiant's good faith as its premise. See Cortina. 630 F.2d at 1213.

The United States Supreme Court, in Franks, stated that an individual could challenge the truthfulness of the material in-ths affidavit. See also Richardson v. State, 376 So.2d 205 (Ala. App.), aff'd, 376 So.2d 228 (Ala. 1978). Relying on the Fourth and Fourteenth Amendments, the Supreme Court stated:

> "Where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires

> that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit."

Franks, 438 U.S. at 155-56; See also Moore v. State, 570 So.2d 788 (Ala. Cr. App. 1990); Villemez v. State. 555 So.2d 342 (Ala. Cr. App. 1989); Gray v. State, 507 So.2d 1026 (Ala. Cr. App. 1987).

The Supreme Court went further in Franks to say:

> "'[W]hen the Fourth Amendment demands a factual showing sufficient to comprise "probable cause," the obvious assumption is that there will be a truthful showing' (emphasis in [Halsey]). This does not mean 'truthful' in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from

> informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. But surely it is to be 'truthful' in the sense that the information put forth is believed or appropriately accepted by the affiant as true."

Franks, 438 U.S. at 164-65, quoting United States v. Halsey. 257 F.Supp. 1002, 1005 (S.D.N.Y. 1966).

Initially, we must determine whether the statements made in the affidavit were made either intentionally or with reckless disregard for the truth. "We know what intentional lies are, but the meaning of 'reckless disregard for the truth' is not self-evident...." United States v. Williams, 737 F.2d 594, 602 (7th Cir. 1984), cert. denied, 470 U.S. 1003, 105 S.Ct. 1354, 84 L.Ed.2d 377 (1985). An affiant acts with "reckless disregard for the truth where he, "in fact entertained serious doubts as to the truth of his" allegations.' ... Reckless disregard for the truth may also be proved inferentially 'from

circumstances evincing "obvious reasons to doubt the veracity" of the allegations.'" United States v. A Residence Located at 218 Third Street. 805 F.2d 256, 258 (7th Cir. 1986). "Because states of mind must be proved circumstantially, a fact finder may infer reckless disregard from circumstances evincing' obvious reasons to doubt the veracity' of the allegations." Williams. 737 F.2d at 602.

When an appellate court reviews a ruling by a lower court on a question concerning whether an individual made a statement with reckless disregard for the truth "'[a]ppellate judges must exercise independent judgment and determine whether the record establishes [reckless disregard for the truth] with convincing clarity.'" A Residence Located at 218 Third Street. 805 F.2d at 259, quoting Bose Corp. v. Consumers Union of United States. Inc., 466 U.S. 485, 514, 104 S.Ct. 1949, 1967, 80 L.Ed.2d 502 (1984). It is clear after a review of the

hearing that the complained-of statements were made with at least a reckless disregard for the truth. The informant, upon whom Lay based his information, did not enter the home of the appellant and did not witness a drug transaction. Another individual, identified as Eric Johnson, was said to have entered the residence and to have made the buy at the residence. However, none of this information is stated in the affidavit and it was not told to the magistrate. Indeed there is no information as to the veracity of Eric Johnson. "Unlike an officer in the field, a magistrate must be presented with facts as to the source of the information in the affidavit and the underlying circumstances from which it could be concluded that the source was reliable." United States v. Kirk, 781 F.2d 1498, 1505 (11th Cir. 1986). The misrepresentations made by Officer Lay resulted in his committing two offenses: "[o]ne against the constitutional guarantee against

unreasonable searches, and a second against the judicial system." Cortina, 630 F.2d at 1213.

The underlined portions must be deleted from the affidavit. We must then determine whether probable cause still exists. Moore, supra; Villemez, supra. (For a thorough discussion of the case law on misstatements made in an affidavit supporting a warrant, see 24 A.L.R.4th 1266; W.LaFave, 2 Search and Seizure 4.4(c) (2d ed. 1987). In this case, after we delete the misrepresented portions from the affidavit, no probable cause exists. Probable cause deals with probabilities. "They are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Illinois v. Gates, 462 U.S. 213, 231, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). The probable cause test "requires 'a practical, commonsense decision whether, given all the circumstances set

forth in the affidavit,' Id. 462 U.S. at 238, 103 S.Ct. at 2332, there is probable cause to believe the suspect committed an offense." United States v. Colklev 899 F.2d 297, 301-02 (4th Cir. 1990).

Thus all the evidence discovered as a result of the search of the appellant's house was due to be suppressed.

II

The appellant next contends that he was deprived of his right to equal protection under the law due to the prosecution's discriminatory exercise of peremptory challenges.

The record shows that 16 members of the 48-member venire were black and that of the state's 18 strikes, 14 were used to strike black veniremembers. The appellant, relying on Batson v. Kentuckv, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), objected to the prosecution's use of peremptory challenges, claiming that they were discriminatory in nature. The trial court

then required the state to explain its use of peremptory strikes. We have previously concluded that where a trial court has made no express finding that a prima facie case of discrimination has been established but nonetheless requires a prosecutor to explain its peremptory challenges, this court will consider such a finding to be implied and will proceed directly to evaluate the prosecution's explanations. Williams v. State. 548 So.2d 501 (Ala. Cr. App. 1988); Currin v. State. 535 So.2d 221 (Ala. Cr. App.), cert. denied, 535 So.2d 225 (Ala. 1988). See also United States v. Forbes, 816 F.2d 1006 (5th Cir. 1987).

When explaining the basis for its peremptory strikes of blacks, the prosecution must offer a clear, specific, and legitimately race-neutral reason for each strike. Batson, supra, at 97; Ex parte Branch, 526 So.2d 609, 623 (Ala. 1987). In the instant case, several of the veniremembers who were struck had previous misdemeanor convictions and two others stated

that they had received "unjust traffic tickets." We consider these strikes to have been nondiscriminatory. See Jackson v. State, 549 So.2d 616 (Ala. Cr. App. 1989) (several prior convictions of juror is a valid race-neutral reason); Powell v. State, 548 So.2d 590 (Ala. Cr. App. 1988), aff'd, 548 So.2d 605 (Ala. 1989) (dissatisfaction with police is a valid race-neutral reason). The reasons offered by the prosecutor for her remaining strikes present serious doubts to this court as to their validity. Those strikes are as follows:

> "Juror number 81, [J.M] lived on Early Street where the police had answered a call, and this particular neighborhood has been identified as a high crime area, in particular, drugs.
>
> "Juror number 25, [H.W.]. Our information there - and I personally observed [H.W.] in court chewing gum, not only during individual voir dire, but during the general voir dire. She was extremely soft-spoken, and it was extremely difficult for me to hear. She was very hesitant in her responses to the question, in particular to the question I asked about what she had heard and what was her opinion about any prior

> proceedings. My opinion was that she did not want to discuss that, and perhaps, had further knowledge she did not divulge.
>
> "Juror number 19, Ms. [R.B.]. [R.B's] attitude appeared to be extremely sad. I was concerned about her desire to be of service in this court. She had a very depressed look about her face. Further, Officer Jones identified her home area of Riviera Road as being that of a high crime area, in particular, drugs.
>
> "Juror number 75, Ms. [C.]. Ms. [C.] indicated she -- or did not indicate that she heard anything about this case. She came to court, and the best judgment I could make Your Honor, she sat towards the middle rear. She had glasses on. They appeared to be darkly tinted. I could not tell if it was for [medical] reasons or if it was because she had worn sunglasses in the courtroom. Because of the numerous exhibits and documents, blow-ups, and other things, I could not take a chance on whether or not she had a vision problem, or contrary to most people, wore sunglasses indoors.

The trial court accepted these reasons as valid. In viewing the prosecutor's actions as a whole, we consider that these challenges of black veniremembers were not based on sound

race-neutral grounds. This court may "reverse a trial judge's determination that the prosecution's peremptory challenges were not motivated by intentional discrimination only if that determination is clearly erroneous." Parker v. State, 568 So.2d 335, 338 (Ala. Cr. App.1990).

Several of the reasons that the prosecutor gave for striking prospecutive jurors were that they lived in high crime areas. See above for reasons given for striking jurors numbers 81 and 19. (We note that one white juror who served on the jury was from a neighborhood with a higher crime rate than the average neighborhood in Montgomery.) We do not believe that this reason alone is a sufficient race-neutral reason.

> "'.. [T]he bare fact that [the venireperson] lived in a high crime area does not warrant the assumption that [that person] would be less interested in law enforcement or would be intimidated by appellant.' Williams, 548 So.2d at 506. ('A few simple questions addressed to this venireperson on voir dire would have cleared

up any doubt concerning the matter, but they were not asked.')"

Warner v. State, [Ms. 3 Div. 945, February 23, 1990]___So.2d___,___(Ala. Cr. App. 1990).

The prosecutor further stated that the reason she struck juror number 75 is that she wore darkly tinted glasses and that she did not know whether she needed the glasses for medical reasons. Here again, the prosecutor could have dispelled her doubts by asking further questions on voir dire. "'"A prosecutor's failure to engage black prospective jurors 'in more than desultory voir dire, or indeed to ask them any questions at all,' before striking them peremptorily, is one factor supporting an inference that the challenge is in fact based on group bias." People v. Turner, 42 Cal. 3d 711, 726 P.2d 102, 111, 230 Cal. Rptr. 656 (1986).'"

Parker, 568 So.2d at 337, quoting Ave#Y Y# State. 545 So.2d 123, 127 (Ala. Cr. App. 1988).

Additionally, we reject the propriety of the prosecutor's striking of juror number 25. The prosecutor stated that this juror was struck because she was chewing gum and was very soft-spoken. We realize that the demeanor of a juror may be a sufficiently race-neutral reason in some instances, although it presents great difficulty to the reviewing authorities. Avery 545 So.2d at 127.

The record also contains testimony at the Batson hearing from several local attorneys. These attorneys had participated in trials prosecuted by the same assistant district attorney as the one in the present case. All of the attorney-witnesses testified that in each instance, the prosecutor had excluded approximately 80% of the black veniremembers. See Powell v. State, 548 So.2d 590 (Ala. Cr. App. 1988), aff'd on other grounds, 548 So.2d 606 (Ala. 1989); Williams, supra; Warner, supra. We cite Judge Bowen, in Warner, stating:

> "In considering this issue, we have taken note of the fact that the State in this case does not write on a clean slate. A number of cases prosecuted in Montgomery County have been reversed because of a Batson violation. Powell v. State, 548 So.2d. 590 (Ala. Cr. App. 1988), affirmed on other grounds, 548 So.2d 606 (Ala. 1989); Williams v. State, 548 So.2d 501 (Ala. Cr. App. 1988); Ackers v. State, 548 So.2d 459 (Ala. Cr. App. 1g87). This consideration is a relevant factor in our review. United States v. Hughes, 864 F.2d 78, 80 (8th Cir. 1988). In view of this fact and the fact that the chief deputy district attorney testified that she 'highly expected' that she would have to justify her peremptory challenges against blacks with racially neutral reasons, we are somewhat puzzled by some of the very weak justifications given by the State."Warne,___ So.2d at____. The same prosecutor involved in the present case, was also involved in Powell, Williams, Warner, and Parker. Of these cases, three were reversed for Batson violations.

We note that many of the traits exhibited by the black veniremembers and given as reasons for challenging them were also exhibited by white members who went unchallenged by the state. The fact that two

blacks actually sat on the jury is not proof that no racial discrimination occurred. United States v. Young-Bey, 893 F.2d 178, 180 (8th Cir. 1990); Mitchell v. State, [Ms. 89-860, February 1, 1991]____ So.2d____ (Ala. Cr. App. 1991). "'[T]he removal of even one juror for a discriminatory reason is a violation of the equal protection rights of both the excluded juror and the minority defendant.'" Parker, 568 So.2d at 338 quoting, Harrell v. State, 555 So.2d 263, 267 (Ala. 1989). We find sufficient evidence from the record to indicate "disparate treatment" by the prosecutor between black members of the venire and its white members. Mitchell,____ So.2d at___; Branch. 526 So.2d at 624.

As stated above, this court may reverse the trial court's determination that the state's peremptory challenges were not motivated by intentional racial discrimination only if the trial court's determination was "clearly erroneous".

Mitchell, ___So.2d at___; Branch, 526 So.2d at 625. The United States Supreme Court recently stated in Powers v. Ohio, ___ U.S.__ , 111 S.Ct 1364, 112 L.Ed.2d 411 (1991), that:

> "A prosecutor's wrongful exclusion of a juror by a race-based peremptory challenge is a constitutional violation committed in open court at the outset of the proceedings. The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause."

Powers, ___U. S.___, 111 S.Ct. at___.

We find therefore, that the prosecutor's challenges of the above veniremembers was so racially discriminatory and that it so tainted the proceedings that the appellant's right to equal protection was denied and he did not receive a fair trial. Accordingly, the trial court erred in denying appellant's Batson motion.

For the reasons as stated above in parts I & II, this case is reversed and remanded to the Circuit Court for Montgomery County for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

ALL THE JUDGES CONCUR.

APPENDIX B

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
JUDICIAL BUILDING, 445 DEXTER AVENUE
MONTGOMERY 36130

JOHN PATTERSON
Presiding Judge
JOHN C. TYSON, III
WILLIAM M. BOWEN, JR.
SAM TAYLOR
H. WARD McMILLAN
Judges

Clerk's Office
(205) 242-4590

Court of Criminal Appeals No. 89-342
(Montgomery Circuit Court No. 89-2098-PH)

Brad Haywood Sims vs. State of Alabama
Appellant Appellee

Dear Sir or Madam:

You are hereby notifed that on July 26, 1991, the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

Applications for rehearing overruled. Rule 39(k) motions denied. No opinion.

LANE W. MANN
CLERK
COURT OF CRIMINAL
APPEALS

lwm:wl

H. Joseph G.L. Marston, III
Assistant Attorney General
11 S. Union St.
Montgomery, AL 36130

Hon. Thomas M. Goggans
P. O. Box 1307
Montgomery, AL 36101

APPENDIX C

THE STATE OF ALABAMA----JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

October 4, 1991

1901699

Ex parte State of Alabama

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: Brad Haywood Sims v. State)

(CCA 89-342 (Montgomery CC-89-2098)

CERTIFICATE OF JUDGMENT
Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

SHORES, J. - Hornsby, CJ., Maddox, Adams, Houston, Kennedy and Ingram, JJ., concur.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said court. Witness my hand this 4th day of Oct 1991

/s/Robert G. Esdale
Clerk, Supreme Court of Alabama

APPENDIX D

RELEVANT ALABAMA STATUTES

Code of Alabama , 1975:

Title 12, § 12-16-100. DRAWING, SELECTION AND EMPANELING OF JURIES IN CRIMINAL CASES - GENERALLY.

(a) In every criminal case the jury shall be drawn, selected and empaneled as follows: Upon the trial by jury in the circuit courts of any person charged with a felony, including a capital felony, a misdemeanor, or violation, the court shall require a strike list or lists to be complied from the names appearing on the master strike list as established in section 12-16-74. In compiling the list or lists, names of qualified jurors may be omitted on a nonselective basis. A strike list shall be furnished for the trial of any case at hand and a copy thereof given to all parties. the jurors whose names appear thereon shall be brought into open court, the

case shall be called and in the presence of the district attorney and the defendant and his attorney, the jurors shall be examined on voir dire for the trial of the case at hand. After the conclusion of the voir dire examination and the removal from the strike list of the names of those jurors who were challenged or excused for good reason, the district attorney shall be required first to strike from the strike list the name of one juror, and the defendant shall strike one, and they shall continue to strike off names alternately until only 12 jurors remain on the strike list and these 12 jurors thus selected shall be the jury charged with the trial of the case. If any defendant shall refuse to exercise a strike to which he is entitled, then the judge presiding shall exercise that defendant's strike for him. The number of names appearing on the strike list upon

commencement of striking, unless a lesser number is agreed to by the parties, shall not be less than 36 if the offense charged is a capital felony nor less than 18 if the offense charged is a misdemeanor or violation. In the event the list of competent prospective jurors is reduced to fewer than the number required by this subsection, the court shall add prospective jurors in the manner prescribed in section 12-16-76. No special venire shall be ordered, drawn, or summoned for the trial of any person indicted for a capital felony.

(b) The court may in its discretion qualify such alternate jurors as it deems necessary, except that in capital cases the court shall qualify at least two alternate jurors, as required by law. Alternate jurors shall be drawn from the venire in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same

functions, powers, facilities, and privileges as the principal jurors, except that they shall not deliberate with the jury or vote upon the verdict unless designated to replace a principal juror. An alternate juror who does not replace a principal juror shall be discharged at the time the jury retires to consider its verdict.

(c) If the court determines that more than two alternate jurors shall be selected in a capital case, or that one or more alternate jurors shall be selected in a noncapital case, upon commencement of striking, unless the parties consent to the use of a lesser number, the minimum number of names required on the strike list in subsection (a) shall be increased by two for each alternate juror to be selected; provided that such increase in names shall not apply for the first two alternate jurors to be selected in a capital case. The parties shall then strike from the strike list as herein provided until there remain

12 jurors. The last juror or jurors struck shall be the alternate or alternates, and if it becomes necessary for an alternate to replace a principal juror, the last juror struck shall be designated. The identity of alternate jurors shall not be divulged to the jurors until the jury retires for deliberation.

(d) Any county having existing laws on April 15, 1982 establishing procedures for the selection and use of alternate jurors, may at the election of the presiding circuit judge, continue to follow the provisions of such law with respect to the selection of alternate jurors. Such election must be made in writing within 30 days of April 15, 1982 and filed with the secretary of state, the clerk of the supreme court, the administrative office of courts and the local bar of the county affected thereby. At any time after said election, either the presiding circuit judge, or a majority of the circuit judges in the

circuit wherein the county is located, may elect to come under the provisions of this chapter by filing written notice as required above.

Title 13A, §13A-12-211 UNLAWFUL DISTRIBUTION OF CONTROLLED SUBSTANCES.

(a) A person commits the crime of unlawful distribution of controlled substances if, except as otherwise authorized, he sells, furnishes, gives away, manufactures, delivers or distributes a controlled substance enumerated in schedules I through V.

(b) Unlawful distribution of controlled substances is a Class B felony.

§13A-12-215. SCHEDULES OF CONTROLLED SUBSTANCES.

"The schedules I through V referred to in this article are the schedules contained in Sections 20-2-20 through 20-2-31, or in those schedules as revised and republished annually by the state board of health pursuant to section 20-2-32.

Title 20, §20-2-23. SAME -- LISTING OF CONTROLLED SUBSTANCES.

The controlled substances listed in this section are included in schedule I:

(1) Any of the following substances, except those narcotic drugs listed in other schedules, whether produced directly or indirectly by extraction from substances of vegetable origin or independently by means of chemical synthesis or by combination of extraction and chemical synthesis:....

d. Coca leaves and any salt, compound, derivative or preparation of coca leaves and any salt, compound, derivative or preparation thereof which is chemically equivalent or identical with any of these substances, but not including decocainized coca leaves or extractions which do not contain cocaine or ecogonine.

APPENDIX E

FACTS PROVEN AT TRIAL

On the trial, the facts relating to the controlled buy, the search and the marked money as set out in Section I of the Statement of The Facts in the petition, were proven by the testimony of Officers Robert Lay and William Jamison. (R. Vol. 5, pp. 246-339 and Vol. 6, pp. 624-645)

Julius Moore testified to the details of the drug sale and the Respondent's statement about having several ounces of cocaine the next day. (R. Vol. 7, pp. 693-705 and 707-709)

After the search of his house, the Respondent was taken to police headquarters. It is not clear if this was an arrest or not, since the Respondent was a Montgomery Police officer. At police headquarters, while he waited to be interviewed, the Respondent volunteered to Officer Tom Sims that he, the Respondent, knew his day was coming, that he, the

Respondent, knew that he was suspected of dealing drugs and was under surveillance, that he had responded to this presumed state of affairs by telling people that he was a "big drug dealer" and endeavoring to antagonize the people whom he thought were watching him. (R. Vol. 8, pp. 812-824)

Officers Michael Jones and J. M. Wooten drove the Respondent to the station. To them, he volunteered that marked money had been found in his house and a suggestion that it may have been money paid to him on a loan. (R. Vol. 8, pp. 881-887)

The State also proved admissions by the Respondent that he was deeply in debt and had serious overdraft problems. The Respondent gave contradictory and patently false explanations for the marked money found in his closet. (R. Vol. 8, pp. 893-908)

The Respondent claimed that the money found in his closet came from various legitimate sources, including money paid to

him on an alleged loan by Eric Johnson on September 29, 1989. (R. Vol. 10, pp. 1293 - Vol. 11, p. 1631)

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, hereby certify that on this _____ day of December, 1991, I did serve the requisite number of copies of the foregoing on the Attorney* for Brad Haywood Sims, Respondent, and his former attorneys** by mailing the same to said Attorneys first class postage prepaid and addressed as follows:

Honorable Thomas M. Goggans*
Attorney at Law
Post Office Box 1307
Montgomery, Alabama 36101

Honorable Julian L. McPhillips** and
Honorable Kenneth J. Shinbaum**
Attorneys at Law
P. O. Box 64
Montgomery, Alabama 36101

JOSEPH G.L.MARSTON, III
ASSISTANT ATTORNEY
GENERAL OF ALABAMA

ADDRESS OF COUNSEL:

Office of the Attorney General
Criminal Appeals Division
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

0292H

Supreme Court, U.S.
FILED
JAN 27 1992
OFFICE OF THE CLERK

(3)

NO. 90-1086

IN THE SUPREME COURT OF
THE UNITED STATES OF AMERICA

October Term, 1991

STATE OF ALABAMA,

Petitioner,

v.

BRAD HAYWOOD SIMS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA
AND ALABAMA COURT OF CRIMINAL APPEALS

RESPONDENT'S BRIEF
IN OPPOSITION TO CERTIORARI

By:
Thomas Martele Goggans
P.O. Box 1307
Montgomery, AL 36101
(205)-834-2511

Attorney for Respondent
Brad Haywood Sims

57

QUESTIONS PRESENTED FOR REVIEW

1. Whether the state appellate court's finding and conclusion that evidence recovered from Respondent's home should have been suppressed because his home was searched as a result of a warrant issued upon an affidavit containing intentional or reckless misrepresentations which, when deleted, left no basis for a finding of probable cause, should be respected?

2. Whether the state appellate court's finding and conclusion that Respondent was deprived of his right to equal protection of the law due to the prosecution's discriminatory exercise of peremptory challenges of potential jurors should be respected?

PARTIES

The caption contains the names of all parties.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW.....i

PARTIES.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

OPINIONS BELOW.....1

JURISDICTION.....1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.....1

STATEMENT OF THE CASE.....4

REASONS FOR DENYING THE WRIT.....33

The Franks v. Delaware issue was properly decided below and is not significant enough for review anyway.....33

The Batson issue was properly decided below and is not significant enough for review anyway.....44

CONCLUSION.....51

CERTIFICATE OF SERVICE.....52

TABLE OF AUTHORITIES

Cases:

Batson v. Kentucky, 476 U.S. 79, 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986).....44

Brown v. State, 568 So.2d 431 (Ala. Cr. App. 1990).....43

Franks v. Delaware, 438 U.S. 154, 57 L.Ed.2d 667, 98 S.Ct. 2674 (1976).....36

Gray v. State, 507 So.2d 1026 (Ala. Cr. App. 1987).....43

Hamm v. State, 564 So.2d 453 (Ala. Cr. App. 1989).....43

Hernandez v. New York, 500 U.S. ___, 114 L.Ed.2d 395, 111 S.Ct. ___ (1991).....45

Ex parte Jackson, 516 So.2d 768 (Ala. 1986).....45

Villemez v. State, 555 So.2d 342 Ala.Crim. App. 1989).....34, 35

Wyley v. State, 565 So.2d 1200 (Ala. Cr. App. 1990).....43

Constitutional Provisions:

Fourth Amendment to the United States Constitution.....7, 36

Fourteenth Amendment to the United States Constitution.....44

Article I, Section 1, Alabama Constitution of 1901.....45

Article I, Section 6, Alabama Constitution of 1901.....45

Article I, Section 22, Alabama Constitution of 1901.....45

Statutes:

Section 12-15-56, Code of Alabama.....45

OPINIONS BELOW

The statement of opinions below contained in the certiorari petition is correct.

JURISDICTION

The statement of jurisdiction contained in the certiorari petition is correct.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(1) Fourth Amendment to the United States Constitution, which provides:

> "The right to the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

(2) Section 1 of the Fourteenth Amendment to the United States

Constitution, which provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(3) Article I, Section of the Alabama Constitution of 1901 which provides: "That all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among those are life, liberty and the pursuit of happiness."

(4) Article I, Section 6 of the Alabama Constitution of 1901 which provides: "That in all criminal

prosecutions, the accused has a right ... in all prosecutions by indictment, a speedy, public trial, by an impartial jury of the county or district in which the offense was committed; and he shall not .. be deprived of life, liberty, or property, except by due process of law...."

(5) Article I, Section 22 of the Alabama Constitution of 1901 which provides: "That no ex post facto law, or any law ... making any irrevocable or exclusive grants of special privileges or immunities, shall be passed by the legislature; and every grant or franchise, privilege, or immunity shall forever remain subject to revocation, alteration, or amendment."

(6) Section 12-16-56, Code of Alabama provides: "A citizen shall not

be excluded from jury service in this state on account of race, religion, sex, national origin or economic status."

STATEMENT OF THE CASE

Procedural Background

The October 1989 Grand Jury of Montgomery County, Alabama returned an indictment charging Montgomery police officer, Respondent, Brad Haywood Sims with having sold cocaine. (R. Vol XV, pp. 2039-2040). Sims was tried by a jury in December of 1989. However, the jury was unable to reach a verdict and, on December 18, 1989, a mistrial was declared and the jury was discharged. (R. Vol. III, p. 620). Sims moved the Circuit Court of Montgomery County, Alabama to dismiss the charge against him, or, in the alternative, to enter a judgment of acquittal in his favor and a

plea of former jeopardy and motion to dismiss on the ground that there was insufficient evidence presented during the trial upon which a conviction could be based. (R. Vol. XV, pp. 2097-2100, 2154-2155). The Circuit Court of Montgomery County, Alabama overruled those motions. (R. Vol XV, pp. 2101, 2154). Sims appealed to the Alabama Court of Criminal Appeals from the denial of his motion for a judgment of acquittal. (R. Vol. XV, p. 2161). The Alabama Court of Criminal Appeals dismissed the appeal on January 22, 1990. (R. Vol. XV, p. 2160). Sims was tried again by a jury in January of 1990. The jury returned a verdict of guilty. (R. Vol. XIII, p. 1936). Sims was sentenced to a term of imprisonment of ten years. That sentence was

suspended conditioned upon Sims serving three years in the penitentiary. (R. Vol XV, pp. 2026-2030).

The Alabama Court of Criminal Appeals reversed Sim's conviction. The Alabama Court of Criminal Appeals based its holding upon two independent grounds.

First, the Alabama Court of Criminal Appeals found and concluded that evidence recovered from Sims' home should have been suppressed because his home was searched as a result of a warrant issued upon an affidavit containing misrepresentations made either intentionally or with reckless disregard for the truth which, when deleted, left no basis for a finding of probable cause. The Alabama Court of Criminal Appeals quoted from Franks v.

Delaware, 438 U.S. 154, at 155-56, 987 S.Ct. 2674, 57 L.Ed.2d 667 (1978):

> "'Where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegations of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit."

The Alabama Court of Criminal Appeals set forth the following statements appearing in the subject

warrant affidavit:

> "That a confidential and reliable informant, hereinafter referred to as 'A' observed a quantity of an off-white rocky substance which appeared to be 'crack cocaine being stored in the residence located at 3437 Perry Street, Montgomery, Alabama, within the past seventy-two (72) hours.
>
> "Further probable cause being that 'A' witnessed crack cocaine being sold out of the residence located at 3437 Perry Street during the month of September.
>
> "Further probable cause being that 'A' has given the affiant information in the past which has proven true through investigative means.
>
> "Further probable cause being that 'A' has assisted the Narcotics & Intelligence Bureau in numerous investigations which have resulted in numerous arrests.
>
> "Further probable cause being that the power for the residence at 3437 Perry Street is in the name of Brad Sims.
>
> "Further probable cause being that intelligence information

> obtained by Narcotics & Intelligence Bureau personnel indicates that Brad Sims is involved in illegal narcotics activity.
>
> "As Brad Sims is a member of the Montgomery Police Department and is therefore most likely armed at least with a Police Department issue 9mm automatic pistol, a no-knock clause is being requested in this warrant for officer safety.
>
> "The foregoing is based on personal knowledge of the affiant and on facts obtained by the Narcotics & Intelligence Bureau, Administrative Division, Montgomery Police...."

(Emphasis supplied by Alabama Court of Criminal Appeals.)

The Alabama Court of Criminal Appeals found and concluded that "[i]t is clear from a review of the [suppression hearing that the complained-of statements were made with at least a reckless disregard of the

truth. The informant, upon whom [the affiant, Officer] Lay, based his information, did not enter the home of [Sims] and did not witness a drug transaction. Another individual, identified as Eric Johnson, was said to have entered the residence and to have made the buy at the residence. However, none of this information is stated in the affidavit and it was not told to the magistrate. Indeed there is no information as to the veracity of Eric Johnson." The Alabama Court of Criminal Appeals found that "[t]he misrepresentations made by Officer Lay resulted in his committing two offenses: '[o]ne against the constitutional guarantee against unreasonable searches, and a second against the judicial system.' United States v.] Cortina, 630

F.2d [1207,] 1213 [(7th Cir. 1980)]." After deleting the misrepresented portions from the affidavit, the Alabama Court of Criminal Appeals found that no probable cause existed and concluded that all the evidence discovered as a result of the search of Sims' house was due to have been suppressed.

Second, the Alabama Court of Criminal Appeals found and concluded that Sims was deprived of his right to equal protection of the law due to the prosecution's discriminatory exercise of peremptory challenges of potential jurors. The Alabama Court of Criminal Appeals found from the record "that 16 members of the 48 member venire were black and that of the state's 18 strikes, 14 were used to strike black vernirepersons." Noting that after Sims

objected to the prosecution's use of peremptory challenges, "the trial court then required the state to explain its use of peremptory strikes," the Alabama Court of Criminal Appeals proceeded to review the explanations proffered by the prosecution.[1] The Alabama Court of Criminal Appeals found a number of the strikes to be nondiscriminatory. However, the Alabama Court of Criminal Appeals, stated that "[t]he reasons

---

[1] In Hernandez v. New York, 500 U.S. ___, 114 L.Ed.2d 395, 111 S.Ct. 1859 (1991), this Court held that "[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a preliminary prima facie showing becomes moot." The Alabama Court of Criminal Appeals had previously held the same. Williams v. State, 548 So.2d 501 (Ala. Cr. App. 1988); Currin v. State, 535 So.2d 221 (Ala. Cr. App.), cert. denied, 535 So.2d 225 (Ala. 1988).

offered by the prosecutor for her remaining strikes present[ed] serious doubts ... as to their validity." "In viewing the prosecutor's actions as a whole, ... [the Alabama Court of Criminal Appeals found] that [those] challenges of black veniremembers were not based on sound race-neutral grounds."

To begin with, the Alabama Court of Criminal Appeals opined that the reasons proffered by the State of Alabama for those strikes were not <u>in and of themselves</u> race-neutral. The Alabama Court of Criminal Appeals further noted with respect to two of the proffered reasons that the prosecutor did not seek to dispel any doubts about the jurors with a few more questions on voir dire.

In viewing the prosecutor's actions

as a whole, the Alabama Court of Criminal Appeals considered the bad track record of the prosecution in the case.

> "The record also contains testimony at the Batson hearing from several local attorneys. These attorneys had participated in trials prosecuted by the same assistant district attorney as the one in the present case. All of the attorney-witnesses testified that in each instance, the prosecutor had excluded approximately 80% of the black veniremembers. See Powell v. State, 548 So.2d 590 (Ala. Cr. App. 1988), aff'd on other grounds, 548 So.2d 606 (Ala. 1989); Williams [v. State, 548 So.2d 501 (Ala. Cr. App. 1988]; Warner [v. State, [Ms. 3 Div. 945, February 23, 1990] ____ So.2d ____ (Ala. Cr. App. 1990)]. We cite Judge Bowen in Warner, stating:
>
> > "In considering this issue, we have taken note of the fact that the State in this case does not write on a clean slate. A number of cases prosecuted in

> Montgomery County have been reversed because of a Batson violation. Powell v. State, 548 So.2d 590 (Ala. Cr. App. 1988), affirmed on other grounds, 548 So.2d 606 (Ala. 1989); Williams v. State, 548 So.2d 501 (Ala. Cr. App. 1988); Ackers v. State, 548 So.2d 459 (Ala. Cr. App. 1987). This consideration is a relevant factor in our review. United States v. Hughes, 864 F.2d 78, 80 (8th Cir. 1988). In view of this fact and that fact that the chief deputy district attorney testified that she "highly expected" that she would have to justify her challenges against blacks with racially neutral reasons, we are somewhat puzzled by some of the very weak justifications given by the State."

"Warner, ____ So.2d at ____. The same prosecutor involved

> in the present case, was also involved in Powell, Williams, Warner, and Parker. Of these cases, three were reversed for Batson violations."

The Alabama Court of Criminal Appeals also noted that many of the traits exhibited by black veniremembers and given as reasons for challenging them were also exhibited by white members who went unchallenged by the State of Alabama.

The Alabama Court of Criminal Appeals, stating twice that it may reverse a trial judge's determination that the prosecution's peremptory challenges were not motivated by intentional discrimination only if that determination is "clearly erroneous," concluded that the trial court had erred to reversal in denying Respondent Sims' Batson challenge.

The State of Alabama timely filed an application for rehearing with the Alabama Court of Criminal Appeals. That application was overruled on July 26, 1991.

The State of Alabama timely filed a petition for writ of certiorari with the Supreme Court of Alabama. The Supreme Court of Alabama denied the State of Alabama's petition on October 4, 1991.

Factual Background

The Franks v. Delaware Matter

The summary of the trial court evidence contained in the opinion of the Alabama Court of Criminal Appeals is substantially correct.[2]

---

[2] The State of Alabama stated in its petition that "[t]he evidence upon which Respondent was convicted is not relevant to the issues ... presented" and submitted its version of the evidence at Respondent's second trial in Appendix "E" to its certiorari petition.

Prior to the each trial, Respondent Sims filed motions to suppress evidence seized from his home pursuant to a search warrant issued by a municipal judge. (R. Vol. XV, pp. 2055-2070, 2105-2120). As grounds for the motions, Sims asserted that the affiant who executed the affidavit had "knowingly, intentionally, or with reckless disregard of the truth, included in his affidavit...false material, in the absence of which the content of the affidavit would have been insufficient to establish probable cause for the issuance of the ... search warrant." (R. Vol XV, pp. 2042-2043, 2059-2060, 2105). Sims alleged that the following

---

A more complete and accurate rendition of the evidence at Respondent Sims' second trial is included in Appendix A to this opposition.

statements in the affidavit were false: (1) "That a confidential and reliable informant, hereinafter referred to as "A" observed a quantity of an off-white rocky substance which appeared to "A" to be 'crack' cocaine being stored in the residence located at 3437 Perry Street, Montgomery, Alabama, within the past seventy-two (72) hours" and (2) "Further probable cause being that 'A' witnessed crack cocaine being sold out of the residence located at 3437 Perry Street during the month of September." (R. Vol. XV, pp. 2060, 2106).

The evidence at a pre-trial suppression hearing held prior to the first trial was as follows:

Robert A. Lay, a detective with the Montgomery Police Department, executed the affidavit upon which the search

warrant was based. (S.R.[3], pp. 7-8). The affidavit contained statements set forth by the Alabama Court of Criminal Appeals in its opinion. (S.R., p. 10, State's Exhibit 1).

Lay identified his informant, referred to as "A" in the affidavit, as Julius Moore. (S.R., p. 12). Lay testified that he based his sworn statement in the affidavit on what Julius Moore had told him. (S.R., p. 12). Lay admitted on cross-examination that Julius Moore had actually stayed in a car and had never gone into Sims' home at the time of the transaction alleged to have taken place between Sims and a third person by the name of Eric Johnson and that Julius Moore had not observed

---

[3] The Supplemental Record is designated herein by "S.R."

any drugs inside of Sims' home. (S.R., pp. 12, 13-14, 28). Lay further admitted that Julius Moore had told him that he had stayed in the car at the time Eric Johnson was supposed to have gone to see Sims about drugs and that Julius Moore had not told him that he had seen any drugs stored in Sims' home. (S.R., pp. 12, 15, 16, 17, 22, 23). Lay also admitted that Julius Moore had not told him that he had seen Sims hand Eric Johnson any drugs and that he had not seen Eric Johnson hand any money to Sims. (S.R., pp. 17, 22, 23). Lay said that he was not in the area at the time. (S.R., pp. 12). Lay said that he did not tell Judge Campbell that Julius Moore stayed in the car during the whole transaction and that he did not discuss the case with Judge Campbell. (S.R.,

pp. 17). Lay at one point testified that he did tell Judge Campbell that they had made a controlled buy. (S.R., pp. 17). Lay admitted though that he had earlier testified that he had lost control for at least a half an hour. (S.R., pp. 17). He still claimed though that it was a controlled buy. (S.R., p. 18).[4] Lay said that happened in this instance only up to a point. He said:

> "...we lost him [Julius Moore] before he went into the house, because we were not aware of the residence he was going to. What actually happened was we had no intention of going to 3437 South Perry Street to buy drugs. We were going to

---

[4] Lay defined a controlled buy as follows: "A controlled buy is basically where you give an informant money, he goes to a residence, goes in and buys the drugs, search him before he goes in, he buys whatever he buys, comes back out and hands it to you. You search him before he leaves to make sure he didn't take any for his own." (S.R., p. 18).

> Cleveland Court to buy drugs from Miami. Miami was not at home so Julius Moore, some black male who we don't know who he was, was outside going, 'I know where you can get some. Come with me.' So they got in Julius Moore's car... They went down to Duncan Drive; but this time Julius Moore is wired and we're still following him...down to Duncan Drive where they pick up Eric Johnson, who says -- They get out of the car. We can hear them get out of the car and get back in. Eric Johnson gets in the car with the other two saying that he knows where they can get some. And they go down, and shortly after they leave Duncan Drive is where we lost contact with them...We went down and looked for them, couldn't find them. We knew that they had to come back to Duncan Drive to drop off whoever this guy was. So we came back to Duncan Drive and watched them drive back up to Duncan Drive and drop him off."

(S.R., pp. 18-19).

Lay then said: "I don't remember exactly what I told [Judge Campbell]. I don't believe I told him it was a

controlled buy. We went on what was written in the affidavit; and I did not write a controlled buy in the affidavit." (S.R., p. 19). He went on to say

> "I don't remember the exact conversation between myself and Judge Campbell. He read over the warrant, didn't really ask me what happened or what actua'ly went on. He read over the warrant, looked at it. I told him that it was a police officer, because he noticed that down at the bottom, and that was the reason for the no knock clause. What else was said, I'm not really sure."

(S.R., p. 2Ø).

Lay attempted to rationalize his misrepresentations to Judge Campbell in the following manner:[5]

---

[5] Of course, Lay did deny having knowingly and intentionally misrepresented anything to Judge Campbell or, with reckless disregard, putting anything in the affidavit which was not true. (S.R., p. 8).

In response to a question from the trial court as to who had seen crack in Sims' home, Lay said:

> "When we put it down and did the search warrant it was on the statement of Julius Moore that Eric Johnson had gone into the residence and met with an unknown subject, he didn't know who it was at that time, brought the crack back out; therefore, in the second paragraph he observed the sale. So, in fact, also the crack had to be in the house; and on the statement he made of Brad Sims coming out to the car and stating that he would have more later, if he wanted to come back to the residence, that, in may opinion as a narcotics investigator, he did, in fact, observe the fact that crack cocaine was being stored in the residence."

(S.R., p. 13). Lay claimed that Julius Moore related to him that he had observed crack being sold out of the residence. (S.R., p. 14). But, when he attempted to explain that claim, he

said: "What he said was that he saw Eric Johnson get out of the car, go around to the back of the house, meet with Brad Sims, they both walked back around, Eric Johnson got back in the car and handed him the dope and he handed Eric Johnson the money, and Eric Johnson went back into the house." (S.R., pp. 14-15). Lay said that Julius Moore had told him that Eric Johnson told him that he was going to get it and that he interpreted that to mean that it was stored in Sims' home." (S.R., pp. 15). He later said:

> "He told me Eric Johnson got out of the car, went to the back of the residence that they were at, which was Brad Sims' house, both subjects came back out, Brad Sims stood in the yard, Eric Johnson same back to the car, gave Julius Moore a bag with crack cocaine inside, Julius Moore gave him $400.00, Eric Johnson walked back up to Brad Sims, who

> turned around when he got to him and walked back around to the back of the house."

(S.R., p. 23). A third time he said:

> "He said Eric Johnson came back to the car and Brad Sims stayed in the yard. Eric Johnson got back in the back seat and handed -- Julius Moore turned around to him and Eric Johnson handed Julius Moore a plastic bag with crack cocaine inside. Julius Moore handed him $400.00. He took the money, got back out of the car, went back up to the house where Brad Sims met him and they walked around to the back of the house." (S.R., p. 24).

Lay also said that Julius Moore told him that Sims told them that if they wanted to come back later he would have some more after 1:00 o'clock. (S.R., p. 25). Lay said that Julius Moore told him that he believed that the cocaine came from Mr. Sims. (S.R., p. 25). Lay said that Eric Johnson had not been searched for drugs himself. (S.R.,

p. 28).

The Circuit Court of Montgomery County denied the motions to suppress.[6] (R. Vol. I, p. 5, R. Vol. XV, p. 2107).

The Batson Matter

In the jury pool from which the parties had to select their jury, there were sixteen blacks and thirty-one whites and one Asian American. The State used 14 of its 18 strikes to eliminate blacks from the jury. Respondent, a black male, made a Batson motion. (R. Vol. IV, p. 147). The trial court then required the State of Alabama to explain its use of peremptory strikes. Chief Deputy District Attorney Ellen Brooks, offered explanations for

---

[6] The latest filed motion to suppress was submitted on the same evidence. (R. Vol. 15, p. 2107).

her strikes.[7]

(R. Vol. IV, pp. 160-161).

As found by the Alabama Court of Criminal Appeals, many of the traits exhibited by the black veniremembers and given as reasons for challenging them were also exhibited by white members who went unchallenged by the state.[8]

---

[7] A full recitation of Chief Deputy District Attorney Brooks' proffered explanations is set forth in Appendix B.

[8] The following white jurors who were not struck by the State of Alabama had the same information by their names as black jurors who were struck by the State of Alabama: 1) High Crime Area: No. 52 - Elise E. Mitchell (R. Vol. XV, p. 2005); 2) Heard About Alleged Set Up: No. 52 - Elise Mitchell (R. Vol. IV, p.84); No. 54 - Jeff Oswalt (R. Vol IV, pp. 75, 76); 3) Had Opinion Of Innocent: No. 89 - James Deaton (R. Vol. IV, p.6); 4) Unjust Traffic Ticket: No. 54 - Jeff Oswalt (R. Vol. IV, p. 109); 5) Traffic Tickets: No. 54 - Jeff Oswalt (R. Vol. IV, p. 109); 6) 23 Years Of Age: No. 70 - E.D. Moore (R. Vol. XVI, p. 2286); 7) Soft Spoken: No. 88 - Jacqueline Frost (R.

At a follow-up hearing, the several local attorneys testified. As was found by the Alabama Court of Criminal Appeals the "attorneys had participated in trials prosecuted by the same assistant district attorney as the one in the present case. All of the attorney-witnesses testified that in each instance, the prosecutor had excluded approximately 80% of the black veniremembers." (R. Vol. XIV, pp. 1953-1954, 1962-1966, 1969-1972, 1974-1978).

Dr. Don Bogie testified that he was the Director of the Center for Demographic and Cultural Research and

---

Vol. 4, p. 10); 8) Only Told Occupation, Did Not Tell Where She Was Employed: No. - 35 Linda Brock (R. Vol. IV, p. 122); No. 51 - Myra Meachem (R. Vol. IV, p. 124) 9) Expressed No Knowledge About Case Despite Educational Background: No. 35 - Linda Brock (R. Vol. IV, p. 122); 10) Knew Attorneys - Associated With Defense Attorneys: No. 98 - Voncille Connor (R. Vol. IV, p. 93).

also a professor of sociology at Auburn University at Montgomery. (R. Vol. XIV, p. 1982). Dr. Bogie testified that the relationship between being black and being struck from jury service in this case was overwhelming. (R. Vol. XIV, p. 1984). Dr. Bogie testified that 14 of 16 blacks were rejected for a rejection rate of 87.5%; that 4 of 14 whites were rejected for a rejection rate of 28.6%; and that the one Asian was not rejected for a rejection rate of Ø%. (R. Vol. XIV, p. 1993). Dr. Bogie testified that generally a higher crime rate was found in neighborhoods with a high percentage of blacks and that generally a lower crime rate was found in neighborhoods with a high percentage of whites. (R. Vol. XIV, p. 1995). Dr. Bogie also testified that Juror Elise Mitchell, a

white female, who actually served on the jury, lived in a neighborhood with a crime rate above the mean for the city. (R. Vol. XIV, p. 2005).

Johnnie Mae Miller testified that she had lived in her home on Early Street for thirty-one years and that if the police ever came there, as indicated in the prosecution's proffer, she did not remember it. (R. Vol. XIV, pp. 1960-1961).

Prosecutor Brooks testified and denied any discriminatory animus.

The Circuit Court of Montgomery County, clearly indicating that it was considered all relevant circumstances, overruled Appellant Sims' Batson motion. (R. Vol. XV, pp. 2323-2326).

Respondent Sims filed a motion for reconsideration of the trial court's

order denying a new trial on Batson grounds with an attached affidavit of Mark Gilmore contradicting Prosecutor Brooks' statement in connection with its proffered reason for striking one of the black veniremembers that he had contacted someone in the District Attorney's office on behalf of Sims. (R. Vol. XV, p. 2320).

REASONS FOR DENYING THE WRIT

1. The Franks v. Delaware issue was properly decided below and is not significant enough for review anyway.

The Alabama Court of Criminal Appeals found and concluded that evidence recovered from Sims' homes should have been suppressed because his home was searched as a result of a warrant issued upon an affidavit containing misstatements made either

intentionally or with reckless disregard for the truth which when deleted left no basis for a finding of probable cause. The State of Alabama essentially quarrels with the Alabama Court of Criminal Appeals' finding of facts in this case.[9] In doing so, the State of

---

[9] The State of Alabama likewise complains about the holding of the Alabama Court of Criminal Appeals in Villemez v. State, 555 So.2d 342 (Ala. Cr. App. 1989). In Villamez, 555 So.2d 342, the a narcotics officer's statement in an affidavit that "informant relayed to me that the person she got the marijuana from was a Ronnie Miller and that he was at the Travelers Motor Inn at 421 E. Broad St. in Gadsden, Al., in Rm. # 36" was a misstatement because the evidence at the suppression hearing showed that the informant actually told another narcotics investigator that information and the other narcotics officer relayed the information to the affiant narcotics officer by telephone. Villamez, 555 So.2d at 343. The Alabama Court of Criminal Appeals rejected the State of Alabama's argument that there was not a misstatement contained in the affidavit because police officers may rely upon information supplied by others. In so doing, the Alabama Court

Alabama is tilting at windmills.

---

of Criminal Appeals reasoned as follows:

> "'Officers operating in the field are entitled to rely on the information and judgment of fellow officers with whom they are working in close concert. The situation is very different when an application is made for a warrant. Unlike officers in the field, a magistrate is not entitled to rely on the judgment of law enforcement officials. He or she is expected to review the material submitted and make a detached, independent judgment as to the existence of probable cause...'"
>
> "'[A] magistrate must be presented with facts as to the source of the information in the affidavit and the underlying circumstances from which it could be concluded that the source was reliable. [Citations omitted]...."

Villamez, 555 So.2d at 344 (citations omitted). The Alabama Court of Criminal Appeals found that the narcotics officer's "failure to properly identify his source of information was at least reckless, if not intentional." Villamez, 555 So.2d at 344.

In accordance with this Court's holding in Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), the Alabama Court of Criminal Appeals simply and properly focused its evaluation on the representations made in the warrant affidavit and the true facts adduced before the trial court. The Alabama Court of Criminal Appeals quoted from Franks v. Delaware, 438 U.S. 154, at 155-56, 987 S.Ct. 2674, 57 L.Ed.2d 667 (1978):

> "'Where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegations of perjury or

> reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit."

Applying the proper rule of law to the facts, the Alabama Court of Criminal Appeals found and concluded that "[i]t is clear from a review of the [suppression] hearing that the complained-of statements were made with at least a reckless disregard for the truth. The informant, upon whom [the affiant, Officer] Lay, based his information, did not enter the home of [Sims] and did not witness a drug transaction. Another individual, identified as Eric Johnson, was said to

have entered the residence and to have made the buy at the residence. However, none of this information is stated in the affidavit and it was not told to the magistrate. Indeed there is no information as to the veracity of Eric Johnson." The Alabama Court of Criminal Appeals found that "[t]he misrepresentations made by Officer Lay resulted in his committing two offenses: '[o]ne against the constitutional guarantee against unreasonable searches, and a second against the judicial system.' United States v.] Cortina, 630 F.2d [1207,] 1213 [(7th Cir. 1980)]." After deleting the misrepresented portions from the affidavit, the Alabama Court of Criminal Appeals found that no probable cause existed and concluded that all the evidence discovered as a

result of the search of Sims' house was due to be suppressed.

The State of Alabama is simply wrong about the evidence.

Robert A. Lay, a detective with the Montgomery Police Department, executed the affidavit upon which the search warrant was based. (S.R., pp. 7-8). The affidavit stated that:

> "That a confidential and reliable informant, hereinafter referred to as 'A' observed a quantity of an off-white rocky substance which appeared to 'A' to be 'crack' cocaine being stored in the residence located at 3437 Perry Street, Montgomery, Alabama, within the past seventy-two (72) hours.
>
> "Further probable cause being that 'A' witnessed crack cocaine being sold out of the residence located at 3437 Perry Street during the month of September.

(S.R., p. 10, State's Exhibit 1).

Lay identified his informant,

referred to as "A" in the affidavit, as Julius Moore. (S.R., p. 12). Lay testified that he based his sworn statement in the affidavit on what Julius Moore had told him. (S.R., p. 12). Lay admitted on cross-examination that Julius Moore had actually stayed in a car and had never gone into Sims' home at the time the transaction alleged to have taken place between Sims and a third person by the name of Eric Johnson and that Julius Moore had not observed any drugs inside of Sims' home. (S.R., pp. 12, 13-14, 28). Lay further admitted that Julius Moore had told him that he had stayed in the car at the time Eric Johnson was supposed to have gone to see Sims about drugs and that Julius Moore had not told him that he had seen any drugs stored in

Sims' home. (S.R., pp. 12, 15, 16, 17, 22, 23). Lay also admitted that Julius Moore had not told him that he had seen Sims hand Eric Johnson any drugs and that he had not seen Eric Johnson hand any money to Sims. (S.R., pp. 17, 22, 23). Lay said that he was not in the area at the time. (S.R., p. 12). Lay said that he did not tell Judge Campbell that Julius Moore stayed in the car during the whole transaction and that he did not discuss the case with Judge Campbell. (S.R., p. 17).

Thus, the following statements in the affidavit were false: (1) "That a confidential and reliable informant, hereinafter referred to as "A" observed a quantity of an off-white rocky substance which appeared to "A" to be 'crack' cocaine being stored in the

residence located at 3437 Perry Street, Montgomery, Alabama, within the past seventy-two (72) hours" and (2) "Further probable cause being that 'A' witnessed crack cocaine being sold out of the residence located at 3437 Perry Street during the month of September." (R. Vol. XV, pp. 2060, 2106)

Lay attempted to rationalize his misrepresentations to Judge Campbell. However, his attempts were clearly disingenuous and, even if taken at face value, do not detract from the basic problem -- he misrepresented the source of his information. Moreover, a truthful affidavit would not have established probable cause for Lay because the word of the informant, at best, depended upon the word of an unknown drug dealer. Hence, the

statements of the affiant must be deemed to have been at least reckless, if not intentional. After the misstatements are deleted from the affidavit in the instant case, it is clear that the remaining portions of the affidavit do not support a determination of probable cause.

Finally, this case necessarily turned upon its own peculiar facts.[10] Regardless of whether the evidence did or did not warrant a finding that the warrant affidavit contained material misrepresentations, this Court should not grant certiorari merely to review

---

[10] In a number of other cases, Alabama courts have rejected claims pursuant to Franks v. Delaware. See e.g., Brown v. State, 568 So.2d 431 (Ala. Cr. App. 1990); Wyley v. State, 565 So.2d 1200 (Ala. Cr. App. 1990); Hamm v. State, 564 So.2d 453 (Ala. Cr. App. 1989); Gray v. State, 507 So.2d 1026 (Ala. Cr. App. 1987).

state appellate courts' interpretation of the facts in a particular case and application of law to facts.

2. The Batson issue was properly decided below and is not significant enough for review anyway.

In Batson v. Kentucky, 476 U.S. 79, 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986), this Court outlined a three-step process for evaluating claims that a prosecutor has used peremptory challenges in a manner violating the Equal Protection Clause. First, the defendant must make a prima facie showing that the prosecution has exercised peremptory challenges on the basis of race. Batson, 476 U.S. at 96-97. Second, if the defendant makes a prima facie showing, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Batson, 476 U.S. at

97-98. Third, the trial court must determine whether the defendant has carried his or her burden of proving purposeful discrimination. Batson, 476 U.S. at 98. Accord, Hernandez v. New York, 500 U.S. ___, 114 L.Ed.2d 395, 111 S.Ct. ____ (1991). An invidious discriminatory purpose may be inferred from the totality of the circumstances. Hernandez v. New York, 500 U.S. ____, 114 L.Ed.2d 395, 111 S.Ct. _____ (1991), citing Washington v. Davis, 426 U.S. 229, 48 L.Ed.2d 597, 96 S.Ct. 2040 (1976).[11]

The State of Alabama claims that

---

[11] The Batson criteria must likewise be met under Article I, Sections 1, 6, and 22 of the Alabama Constitution of 1901. Ex parte, Jackson, 516 So.2d 768 (Ala. 1986)(hereinafter "Jackson"). Further, Section 12-16-56, Code of Alabama provides:. "A citizen shall not be excluded from jury service in this state on account of race, religion, sex, national origin or economic status."

the Alabama Court of Criminal Appeals ignored this process and reversed Sims' conviction without ever ruling on whether Sims made out a prima facie case of racial discrimination or whether he carried his burden of proving purposeful discrimination. The State of Alabama also claims that the Alabama Court of Criminal Appeals treated the issue as one purely of law and accorded no deference to the trial court's findings. These claims are clearly without merit.

The Alabama Court of Criminal Appeals found from the record "that 16 members of the 48 member venire were black and that of the state's 18 strikes, 14 were used to strike black vernirepersons." Noting that after Sims objected to the prosecution's use of peremptory challenges, "the trial court

then required the state to explain its use of peremptory strikes," the Alabama Court of Criminal Appeals proceeded to review the explanations proffered by the prosecution.[12] The Alabama Court of Criminal Appeals found a number of the strikes to be nondiscriminatory. However, the Alabama Court of Criminal Appeals, stated that "[t]he reasons offered by the prosecutor for her remaining strikes present[ed] serious doubts ... as to their validity." "In viewing the prosecutor's actions as a whole [i.e. in viewing the totality of the circumstances], ... [the Alabama Court of Criminal Appeals found] that [those] challenges of black veniremembers were not based on sound race-neutral grounds."

---

[12] See note 1.

The Alabama Court of Criminal Appeals did not hold that the reasons proffered by prosecutor Brooks were race-based as a matter of law as posited by the State of Alabama. The Alabama Court of Criminal Appeals simply opined that the reasons proffered by the State of Alabama for those strikes were not in and of themselves race-neutral. The Alabama Court of Criminal Appeals further noted with respect to two of the proffered reasons that the prosecutor did not seek to dispel any doubts about the jurors with a few more questions on voir dire.

In viewing the prosecutor's actions as a whole, the Alabama Court of Criminal Appeals considered the previous record of discrimination by the prosecutor.

The Alabama Court of Criminal Appeals also noted that many of the traits exhibited by black veniremembers and given as reasons for challenging them were also exhibited by white members who went unchallenged by the state.

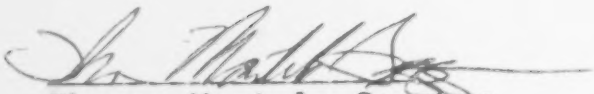
Obviously, the Alabama Court of Criminal Appeals satisfied each step of the process for analysis of jury discrimination issues to reach the ultimate question of whether Respondent Sims carried his burden of proving discrimination. Further, the Alabama Court of Criminal Appeals did not treat this issue purely as a matter of law. Rather, stating twice that it may reverse a trial judge's determination that the prosecution's peremptory challenges were not motivated by

intentional discrimination only if that determination is "clearly erroneous," it gave appropriate deference to the trial court. It simply concluded that the trial court had clearly erred to reversal in denying Respondent Sims' Batson challenge.

Finally, this case turned upon its own peculiar facts. Regardless of whether the evidence did or did not warrant a finding that the trial court had clearly erred in denying Respondent Sims' Batson challenge, this Court should not grant certiorari merely to review state appellate courts' interpretation of the facts in a particular case and application of law to facts.

CONCLUSION

The petition for writ of certiorari should be denied.



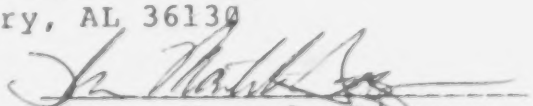
Thomas Martele Goggans
P.O. Box 1307
Montgomery, AL 36101
(205)-834-2511

Attorney for Respondent
Brad Haywood Sims

CERTIFICATE OF SERVICE

I, Thomas Martele Goggans, a member of the Bar of the Supreme Court of the United States of America and the attorney for Respondent Brad Haywood Sims, hereby certify that on this 25th day of January, 1992, I did serve the requisite number of copies of the foregoing upon the attorneys for the Petitioner by mailing the same to the attorneys first class postage prepaid and addressed as follows:

James H. Evans
Attorney General
Joseph G. L. Marston, III
Assistant Attorney General
Office of the Attorney General
11 South Union Street
Montgomery, AL 36130



Thomas Martele Goggans
P.O. Box 1307
Montgomery, AL 36101
(205)-834-2511

Attorney for Respondent
Brad Haywood Sims

Supreme Court, U.S.
FILED
JAN 27 1992
OFFICE OF THE CLERK

4

NO. 90-1086

IN THE SUPREME COURT OF
THE UNITED STATES OF AMERICA

October Term, 1991

STATE OF ALABAMA,

Petitioner,

v.

BRAD HAYWOOD SIMS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA
AND ALABAMA COURT OF CRIMINAL APPEALS

APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

Thomas Martele Goggans
P.O. Box 1307
Montgomery, AL 36101
(205)-834-2511

Attorney for Respondent
Brad Haywood Sims

TABLE OF APPENDICES

APPENDIX A, Evidence at second trial....1

APPENDIX B, Proffered Explanations for Strikes.....51

Certificate of Service.....68

APPENDIX A

Evidence at Second Trial

Montgomery Police Department officer Robert Lay related that Julius Moore was one of his partner's informants. (R. Vol. V, p. 256). According to Lay, "[h]e found him by he called up one day and offered his services, said that he knew a number of drug dealers and he wanted to help put them in jail." (R. Vol. V, p.256). Lay said that he had personally worked cases with Moore. (R. Vol. V, p.256). Moore had been convicted of assault in the first degree and given a three year suspended sentence. (R. Vol. VII, p.693). Moore had also been convicted of possession of a controlled substance and given a five year suspended sentence. (R. Vol. VII, p.693). Lay said that he had not gone to the

sentencing judge on Moore's behalf. (R. Vol. V, p.338). John Sanders, a State Probation and Parole Officer to whom Moore's case was assigned, testified that he had recommended probation in Moore's case. Sanders said that he had not been contacted by anyone with the Montgomery Police Department about Moore. (R. Vol. VII, pp. 786, 787). Moore had testified against others who were found not guilty. (R. Vol. VII, p.714).

Lay testified that he planned to use Julius Moore on September 29, 1989 in an investigation of James Ray Walker, a/k/a Miami. (R. Vol. V, p.257). Moore testified that he knew Miami as a drug dealer. (R. Vol VII, pp. 693-694). Lay said that Moore came to his office and said he had a deal already set up with Miami. Lay said Moore told him that he

had talked to Miami on the telephone earlier that day and arranged to buy an ounce of cocaine for $600.00. (R. Vol. V, p. 258).

Lay asked Lieutenant R.C. Martin to sign out $700.00. (R. Vol. V, p.260). Lt. Martin, at first denied Lay's request. (R. Vol. VI, p. 444). Lt. Martin told him in a joking manner that if it did not go through they would both be in a lot of trouble. (R. Vol. VI, p. 446). Lay got the money. (R. Vol. V, pp. 265, 267). Lay filled out a petty cash voucher for the $700.00. (R. Vol. V, pp. 260-261, State's Exhibit 8). Lay also filled out a document stating the amount of money paid for cocaine and the amount of money paid to Moore even though no money had been paid yet. (R. Vol. V, pp. 263-265, State's Exhibit 6). Lay said

that he usually did not fill out the expense vouchers until after the money was spent. (R. Vol. V, p. 265). He said that he filled this voucher out in advance because it was near the end of the fiscal year and it would be difficult for Lt. Martin to re-up the books later. (R. Vol. V, pp. 266, 269). Lay said that he took out $100.00 and recorded the serial numbers of $600.00. (R. Vol. V, p. 273). Lay said that he did not record the serial numbers on the other $100.00 because it was to go to Moore and he knew it would not be in the house. (R. Vol. V, p. 273). Lay said that he put the list in his evidence locker. (R. Vol. V, p. 273).

Lay said that the procedures for controlled drug buys had not changed since he had been with the Vice and

Narcotics Bureau.[1] But, Lay claimed that the procedures varied from case to case. (R. Vol. V, p. 389). According to Montgomery Police Department detective Bill Jameson, the procedures had not changed since 1984. (R. Vol. VII, p. 658). Jameson said that the procedure he and many others followed was to photocopy the money before the buy. (R. Vol. VII, p. 653). He said though that there were no written rules regarding photocopying buy money and that he had not known of an enforced policy on the matter. (R. Vol. VII, pp. 655, 665).

Moore was wired. (R. Vol. V, pp. 274, 275, R. Vol. VII, pp. 626, 694, State's Exhibit 19). Moore and his car were searched. (R. Vol. V, p. 259, R.

---

[1] Lay said he started with the Vice and Narcotics Bureau in May of 1988. (R. Vol. V, p. 387).

Vol. VII, p. 695). No drugs or money were found in Moore's car. (R. Vol. V, p. 260). Lay gave Moore $600.00 as they went outside to leave on the deal. (R. Vol. V, pp. 260, 274, R. Vol. VII, p. 695).

Lay and Montgomery Police detective Bill Jameson followed Moore in a separate car in which they the wire surveillance equipment. Lay said that they followed Moore to the Cleveland Court area where Miami stayed. (R. Vol. V, p. 275). Lay said that Moore got out of his car to go into Cleveland Court but that Miami was not at home. (R. Vol. V, p. 275). Lay said that Moore spoke to another individual identified by Moore as "Big Man" and that Moore and "Big Man" got into Moore's car and headed south. (R. Vol. V, pp. 275-276). Lay said that he

did not see "Big Man" get into Moore's car. (R. Vol. V, p. 361).

Moore said that he could not find Miami, (R. Vol. VII, p.695), and that "Big Man," who was standing outside[2], told him he was going to take him over to Fairview Avenue where dope was found. (R. Vol. VII, p. 696).

Moore said that they then went there. (R. Vol. VII, p. 696). Moore testified that a young woman, whom he did not know, came out and said that they did not have any dope. (R. Vol. VII, p. 696). Lay said that he did not see Moore speaking to a female. (R. Vol. V, p. 360).

Moore said that the man then took him to Duncan Drive. (R. Vol. VII, p.

---

[2] Moore said that Miami normally had someone outside to escort customers in to his apartment. (R. 724-725).

696).

Lay said that he and Jameson heard over the wire that Moore and "Big Man" were headed for Duncan Drive and followed them. (R. Vol. V, p. 276). According, to Jameson, Duncan Drive was infested with drugs. (R. Vol. VII, p. 672).

Once on Duncan Drive, a man Moore identified as "Chuckie" or Chubbie," later identified as Eric Johnson, got in the car with Moore and "Big Man" and directed them to Court Street. (R. Vol. VII. p. 697). Moore said that there were a lot of people standing around Johnson selling drugs. (R. Vol. VII, p. 756). Moore acknowledged that Johnson could have obtained drugs from any number of sources before he ever got to Perry Street. (R. Vol. VII, p. 756). Moore said that he did not know if there was

any cocaine in the car before they got to Mr. Sims' home. (R. Vol. VII, p. 727). Lay said that he did not see Moore on Duncan Drive. (R. Vol. V, pp. 360, 365).

According to Lay and Jameson, they lost contact with Moore for about five minutes (10:31-10:34 a.m.) and again from 10:41 a.m. - 11:05 a.m. (R. Vol. VII, pp. 633, 634, State's Exhibit 21). Lay testified that as they were leaving Duncan Drive, they had trouble hearing what was being said and did not know where they were going. (R. Vol. V, p. 277). Lay related that they went west but did not see them and then lost contact with the wire. (R. Vol. V, p. 277). Lay related that they then went back to Duncan Drive and waited. (R. Vol. V, p. 280). Jameson said during those times there were no voices coming

over the wire, but only static. (R. Vol. VII, p. 634). Jameson said that when contact was lost, he put the tape recorder on pause to save tape. (R. Vol. VII, pp. 634, 636).

Moore related that Johnson got out of the car and said that he was going to make a telephone call. (R. Vol. VII, p. 697). Moore testified that he did not see where Johnson went. (R. Vol. VII, p. 697). Moore said that Johnson came back out and directed him to Perry Street. (R. Vol. VII, p. 697). Moore said that "he said he had called this guy by the name of 'Big Man.'" (R. Vol. VII, p. 728). Moore said that he did not know what Johnson might have picked up when he went inside. (R. Vol. VII, p. 744). Moore acknowledged that there was drug dealing in his car before he ever got to

Perry Street. (R. Vol. VII, p. 743). He said that Eric Johnson had given "Big Man" marijuana and that Eric Johnson had smoked marijuana in the car. (R. Vol. VII, pp. 743, 744).

Moore said that he had told Johnson that he wanted one-half ounce but that Johnson said the guy did not have a half ounce but had only $400.00 worth of rocks and that he could double his money. (R. Vol. VII, p. 698). Moore said that they got to Perry Street around 10:00 a.m. (R. Vol. VII, p. 700). When they got to Perry Street, Moore gave Johnson $400.00 to get cocaine. (R. Vol. VII, p. 698). Moore said that Johnson got out and went into Sims' house. (R. Vol. VII, p.698). Moore said that when Johnson came out of Mr. Sims' home he gave him the cocaine. (R. Vol. VII, p. 728). Moore said that

he did not see any cocaine before Johnson got back into the car. (R. Vol. VII, p. 728). Moore said that he did not see anything inside of the house. (R. Vol. VII, p. 732). Moore said that Mr. Sims and Johnson both came back outside. (R. Vol. VII, p. 699). Moore claimed that Mr. Sims walked to the passenger side of the car and that "Big Man" rolled down the window. (R. Vol. VII, p. 699). According to Moore, Johnson was standing there talking to him. (R. Vol. VII, p. 699). He initially said that he could not hear what they were talking about. (R. Vol. VII, p. 699). But, he claimed that he heard Sims say that he would have four ounces of cocaine by twelve o'clock or later on that afternoon. (R. Vol. VII, p. 700). Moore said that he looked at the cocaine while Sims was in the

driveway. (R. Vol. VII, p. 735). Moore acknowledged that he had previously testified that he was given cocaine after he began driving away from Sims' home. (R. Vol. VII, pp. 737-738). Moore said that he did not see any exchange of drugs for money. (R. Vol. VII. p. 732).

Moore took Johnson back to Duncan Drive and "Big Man" back to Cleveland Court. (R. Vol. V, p. 280). Lay followed Moore from Duncan Drive back to his office. (R. Vol. V, p. 281). Lay said that he learned the address on South Perry Street when Moore told him over the wire on the way back to his office. (R. Vol. V, p. 396). Lay said that he had not searched the individual who got into Moore's car. (R. Vol. VI, p. 479).

Lay said that when he got back to headquarters, Moore, while still outside,

gave him crack and $200.00. (R. Vol. V, p. 281, R. Vol. VI, p. 418, R. Vol. VII, pp. 702, 703, State's Exhibit 12). Lay said that he searched Moore after he got back to headquarters and found no drugs or money. (R. Vol. V, p. 337, R. Vol. VIi, p. 707). Lay left Moore downstairs, went upstairs to talk to Lt. Martin, went back downstairs, and searched Moore's car. (R. Vol. VI, p. 409, R. Vol. VI, p. 707). Lay said that Moore's car was not searched immediately after they got back to headquarters. (R. Vol. VI, p. 408). Lay said that he photocopied the $360.00 and turned all of the money over to Bill Jameson. (R. Vol. V, pp. 282, 283, 316-318, 320, 321, State's Exhibit 4, State's Exhibit 11-A). Moore said that he walked with Jameson to Lieutenant Martin's office and that he did not see Jameson after he

went into Lieutenant Martin's office. (R. Vol. V, pp. 282-283). Lay said that he and Lt. Martin matched the serial numbers on the seized money against the serial numbers on his "cleaned up" list. (R. Vol. V, pp. 313-314). Lay said that $360.00 of the $932.00 -- three $100.00 bills and three $20.00 bills -- matched. (R. Vol. V, pp. 316, 322). Curiously, some of the serial numbers on Lay's "cleaned up" list were back-to-back numbers. (R. Vol. VI, pp. 533-545). Jameson testified that he took the $360.00 to the City Finance Department to be placed back into the general fund of the City of Montgomery, (R. Vol. VII, p. 641, State's Exhibit 17). Jameson testified that he photocopied the $572.00. (R. Vol. VII, p. 648).

Moore said that he gave Lay a

description of Eric Johnson. (R. Vol. VII, p. 708). Lay and Moore testified that Moore took Lay back to Sims' house. (R. Vol. VI, p. 413, R. Vol. VII, p. 703). Lay said they then returned to headquarters, and checked with Alabama Power Company to obtain the identity of the residents of 3437 South Perry Street. (R. Vol. VI, p. 413). Lay said that he was informed that the address was Sims' (R. Vol. V, p. 296). Lay said that when he came up with Sims' name he told Lt. Martin. (R. Vol. V, p. 296).[3] Moore picked Sims out of a photographic line-up. (R. Vol. V, pp. 326-330, State's Exhibit 15). Lay then gave Moore $100.00. (R. Vol. V, p. 337, R. Vol.

---

[3] Lay said that he went to Lt. Martin rather than his immediate supervisor, Sergeant Tom Azar, because Sergeant Azar was not there. (R. Vol. V, p. 297).

VII, p. 709).

Lay said that he cleaned up the list of serial numbers. (R. R. Vol. V, pp. 281-282). Lay said that he rewrote the list to include only those bills which were missing from the $200.00 given to him by Moore. (R. Vol. V, pp. 281-282, State's Exhibit 9). Lay said that he then put the cleaned up list in his locker and gave the $200.00 to Lieutenant Martin. (R. Vol. V, pp. 281, 282). Lay said that he shredded and threw away the original list with the $600.00 listed on it. (R. Vol. VI, pp. 486, 570).

Municipal Judge Clark Campbell issued a search warrant which was executed later that afternoon. (R. Vol V, p. 307, State's Exhibit 2). Lay and a patrol supervisor to see if Sims was home. According to Lay, the supervisor

knocked on the door and no one answered. (R. Vol. V, pp. 307-308). Lay said that they waited around an hour before making entry into Sims' home. (R. Vol. V, p. 308). The search team found no drugs, no scales, no paraphernalia, no weights, no pipes, no bags, no drug residue, and no records. (R. Vol. V, p. 319, R. Vol. VI, pp. 496, 515, R. Vol. VII, p. 675). While the search was going on without success, they received instructions over the radio from Capt. Bodine, who was in a car with Montgomery Police Department Chief John Wilson, to pick up all Montgomery Police Department uniforms and property. (R. Vol. V, p. 312, R. Vol. V, p. 496). Search team member Ed McCurdy searched the bedroom. (R. R. Vol. V, p. 311). Five minutes before the search team left, McCurdy found money in the

back of the bedroom closet and handed it to Lay. (R. Vol. V, pp. 311, 312, R. Vol. VII, pp. 675-677). Sims was not at home when the money was supposedly found. (R. Vol. V, p. 319). Lay said that he counted the money -- $932.00. (R. Vol. V, p. 316).

Sims was searched. $202.00 was found on Mr. Sims' person. (R. Vol. V, p. 331).

After the search warrant was executed Sims was taken from his home to Vice and Narcotics Headquarters. (R. Vol. VIII, p. 814). Vice officer Tom Simon sat in an office with Mr. Sims. (R. Vol. VIII, p. 814). Simon said "Mr. Sims said to [him]...I knew this day was coming, as an exclamation. And I asked him, what do you mean? He said he'd been told by a narcotics officer that our

commander -- he called him Lieutenant Bodine -- suspected him of dealing drugs, and he felt that Captain Bodine was out to get him." (R. Vol. VIII, p. 817). Simon testified that Sims said he had done several things since he had learned that information from the unnamed narcotics officer that he felt brought about his arrest. (R. Vol. VIII, p. 821). According to Simon, Sims said that his job performance had gone down and that he would tell people he was a big drug dealer and say catch me if you can type things. (R. Vol. VIII, p. 821). Simon also said that Sims told him that he felt like he was under surveillance all of the time and that when he left his house on the way to work he would raise both hands flipping birds. (R. Vol. VIII, pp. 821-822). Simon related that

Sims said that he must be a pretty bad drug dealer since he was so badly in debt and related that his car had been repossessed, that he was behind on his rent, and that he was trying to save $2,000.00 for something. (R. Vol. VIII, p. 822). Simon also said that Sims told him that he saw two officers near his house and for that reason decided to go shopping instead of to his house. (R. Vol. VIII, pp. 823-834).

Robert Lay, being recalled by the State, was allowed to testify that the police department had information that made them suspicious of Sims as a possible drug dealer prior to September 29, 1989. (R. Vol. VIII, pp. 853-854).

Michael Jones and J. M. Wooten drove Sims from Vice and Narcotics headquarters back to his home. (R. Vol. VIII, p.

882). Jones said that when they first got into the car, Sims' asked them if they had been on the search of his home and that they replied no. Jones also said that Sims asked them if they had any part in the investigation of him and that they replied no. Jones also testified that Sims said that marked money had been found and that he did not doubt it because he regularly loaned money to people. Jones testified that Sims added that he had $500.00 to $600.00 loaned out and that a man had repaid him $70.00. (R. Vol. VIII, p. 884). Jones also testified that Sims asked them if his telephone were tapped and that they told him that they had no knowledge of it and that they knew nothing of the investigation. (R. Vol. VIII, p. 884). Jones said that Sims had told them that he thought his telephone

had been tapped for some time, that they were listening and that he had purposefully called several local drug dealers and pretended to talk about cocaine and set up deals. (R. Vol. VIII, p. 884). Jones said Sims also told them that he had talked about a lot of supervisors -- specifically lieutenants and captains -- to get at them because he thought they were listening. (R. Vol. VIII, p. 885). Jones also related that Sims told him that every day when he walked out to his patrol car he flipped a bird in case they were watching him. (R. Vol. VIII, p. 885). Jones said Sims told them that two patrol officers had told him that the Vice and Narcotics Bureau was investigating him and had him under constant surveillance. (R. Vol. VIII, p. 886). Jones also said that Sims told him

that a Vice and Narcotics detective had told him that he was being investigated for drug activity. (R. Vol. VIII, p. 886).

George Wyatt Gantt, a captain in the internal affairs bureau of the Montgomery Police Department gave evidence as to an October 2, 1989 conversation Sims had in the Internal Affairs Bureau of the Montgomery Police Department. Capt. Gantt testified that the $200.00 was recovered from Lieutenant Martin. (R. Vol. VIII, p. 914).

To conclude its case, the State of Alabama introduced Mr. Sims' testimony before the Montgomery County Grand Jury which indicted him. (R. Vol. VIII, p. 923).

The Circuit Court of Montgomery County overruled Appellant's motion for a

judgement of acquittal at the conclusion of the State's case in chief. (R. Vol. VIII, p. 933).

The defense case in chief was essentially as follows:

Montgomery Police Department Officer Willie McCord testified that about a month prior to the search of Sims' home, Sims had told him that he had information on high ranking officials in the Montgomery Police Department having engaged in illegal conduct. McCord related that Sims had told him that, according to an informant, Bodine was receiving money for protection. (R. Vol. VIII, p. 939). McCord testified that a week later he told Sims that he might be under surveillance by the Vice and Narcotics Bureau. (R. Vol. VIII, pp. 939, 947). McCord at first said that the

person who told him that Sims was being followed was black. (R. Vol. VIII, p. 950). However, he then said that the person was a white female. (R. Vol. VIII, p. 950). McCord said that he had made the first statement as to the identity of the person because he was trying to protect her. (R. Vol. VIII, p. 950). After this, McCord was advised of his rights out of the presence of the jury. (R. Vol. VIII, p. 950). McCord later named Cathy Fleming as the person who had told him. (R. Vol. VIII, p. 954). McCord then named Lesley Crumble, a black male, as the person who had told him. (R. Vol. VIII, p. 964). McCord admitted that he had lied about the identity of the person who had told him. (R. Vol. VIII, p. 969).

Montgomery Police Department officer

A. J. Jones testified that Sims had told him he had information about Bodine about two to three weeks prior to the search of his house. (R. Vol. VIII, p. 973). The State's objection to Sims' questions as to whether rumors in Vice and Narcotics filtered up was sustained. (R. Vol. VIII, pp. 974-975). A. J. Jones said that Sims had asked him if he were being investigated. (R. Vol. VIII, p. 982).

Montgomery Police Department Lieutenant R. C. Martin, the second command of the Vice and Narcotics Bureau, testified that he had received information that Sims was trying to obtain Vice and Narcotics radio codes. (R. Vol. VIII, p. 986). Martin also testified that he had heard that Sims had information to the effect that Bodine was taking protection money. (R. Vol. VIII,

pp. 986-987). Martin stated that he was not pleased to hear that. (R. Vol. VIII, p. 987). Martin said that he could not recall whether he heard that before or after the search of Sims' house. (R. Vol. VIII, p. 987). Martin said that he did not know Julius Moore. (R. Vol. IX, p. 1016). Martin testified that he had previously heard Sims name connected to drug deals. (R. Vol. IX, p. 1024). Martin said that he first heard about Sims having been involved with the subject transaction about twelve or one o'clock on September 29, 1989 when Lay told Bodine and him that a police officer might be involved. (R. Vol. VIII, pp. 990, 999). Martin related that Lay had asked him to check out $700.00 (R. Vol. VIII, p. 990). Martin said that he did not give Lay the money initially because

he was working on accounting books to be sent downtown and had already accounted for the petty cash on paper. (R. Vol. VIII, 995, 1019). He related though that Lay came back and said that he had a sure thing. (R. Vol. VIII, p. 995). Martin said that he gave Lay the money and told him that if it did not go through, they both would be in a lot of trouble. (R. Vol. VIII, p. 991). Martin testified that he said that to Lay because of all of the paperwork would have to be changed. (R. Vol. VIII, p. 995).

Martin said that he put the $200.00 into a safe. (R. Vol.IX, p. 1010). Martin admitted that he himself was the subject of a grand jury investigation. (R. Vol. IX, p. 1031).

Martin also said that a vice officer is not supposed to destroy an original

list of recorded serial numbers made in connection with a controlled buy. (R. Vol. IX, p. 1038).

Former Montgomery Police Department Officer Jerald Richardson testified that he left the Montgomery Police Department for the Leeds Police Department in January of 1989. (R. Vol. IX, pp. 1053-1055). Richardson said that he began with the Montgomery Police Department in November of 1980 and that he worked in the Vice and Narcotics Bureau from April of 1987 to November of 1988. (R. Vol. IX, p. 1058). Richardson testified that his work with the Leeds Police Department took him throughout the state. (R. Vol. IX, p. 1063).

Former Montgomery Police Department officer Bill Wright testified that he was with the Montgomery Police Department

from January of 1978 through March of 1988. (R. Vol. X, p. 1259). Wright said that he had done two stints in the Vice and Narcotics Bureau. (R. Vol. X, p. 1260).

Montgomery Police Department Lieutenant Robert Hankins, an assistant Internal Affairs Officer testified that a September 29, 1989 drug screen test on Sims had been negative. (R. Vol. X, p. 1274). Hankins testified that Martin turned the $200.00 over to him in mid-October of 1989. (R. Vol. X, p.1277). According to Hankins, after he asked Martin for the $200.00, there was no delay in Martin turning the money over to him. (R. Vol. X, p. 1279). Hankins said that the $200.00 had come from the safe. (R. Vol. X, p. 1279).

Leroy Mills testified that about a

year and a half prior to the trial he had bought a Rottweiler puppy from Sims. (R. Vol. X, pp. 1283, 1287). Mills recalled paying between $220.00 and $250.00 for the puppy. (R. Vol. X, p. 1283). Mills recalled seeing another litter of puppies within the previous year. (R. Vol. X, p. 1290).

Brad Sims testified in his own defense. He related that he was twenty-four years old and was a graduate of Jefferson Davis High School. (R. Vol. X, p. 1293). Sims also attended Troy State University where he was a running back on a national championship football team. (R. Vol. X, p. 1294). Sims related that he was married to another Montgomery Police Department Officer and that they had two small children. (R. Vol. X, pp. 1294-1296).

Sims said that he and his wife had never worked in the Vice and Narcotics Bureau and that he had never worked under the supervision of Bodine or Martin but that Martin had been his sergeant at the Montgomery Police Academy. (R. Vol. X, p. 1372). Sims said that he had no difficulties with Martin and that he had no personal difficulties with Bodine. (R. Vol. X, pp. 1372, 1373). Sims acknowledged that Bodine had written a complimentary letter concerning him in January of 1988. (R. Vol. X, p. 1373).

Sims testified that he had participated in drug busts during his career as a police officer and that he had run into drug informants. (R. Vol. X, pp. 1297, 1298). Sims related that a month and a half prior to September of 1989 he had received information that

Bodine was receiving protection money. (R. Vol. X, pp. 1299-1300, 1306). Sims said that he did not tell Montgomery Police Department Chief John Wilson because Wilson and Bodine had been roommate and that he was afraid of Bodine. (R. Vol. X, p. 1302). Sims said that he did relay the information to fellow Montgomery Police Department officers Willie McCord, Frank Brown, and Arthur Jones. (R. Vol. X, pp. 1300, 1301, 1302, 1377-1378). Sims said that after he began circulating that information he had reason to believe he was being followed. (R. Vol. X, 1303). Sims testified that James Jackson, a local car dealer, was the first person to tell him. (R. Vol. X, pp. 1303, 1375). Sims acknowledged that he knew that James Jackson was a convicted felon. (R. Vol.

X, p. 1374). Sims said that just about every day after that he would hold up his hand and make an unfriendly gesture. (R. Vol. X, p. 1306). Sims said that he believed that if Bodine were investigating him, he would tap his telephone. (R. Vol. X. p. 1307). Sims denied calling any drug dealers on the telephone. (R. Vol. X, p. 1307).

Sims related that on September 29, 1989, he had worked the swing shift and was asleep on the couch in his den. (R. Vol. X, pp. 1308, 1309). Sims testified that his wife, who worked second shift patrol, was at work and that Sharon Lampley was there helping him baby-sit. (R. Vol. X, p. 1309).

Sims said that he was awakened by a knock on the door. (R. Vol. X. p. 1310). Sims identified the person at the door as

Eric Johnson who had been Sims friend since junior high school. (R. Vol. X, p. 1310). Sims said that Johnson paid him back money he had loaned him. (R. Vol. X, p. 1310). Sims said that Johnson gave him $400.00. (R. Vol. X, p. 1316). Sims testified that Johnson had told him that the money had come from the sale of a car. (R. Vol. XI, p. 1474). Sims recalled that he had loaned Johnson $400.00 or more. (R. Vol. X, 1311). Sims said that he had loaned Johnson the money because he was a friend in need. (R. Vol. X, p. 1311). Sims testified that both of their cars had been the subject of voluntary repossession actions and that they had no car at the time. (R. Vol. X, pp. 1311-1312). Sims said that they did not have the cars at the time he loaned Johnson the money. (R.

Vol. X, p. 1313). Sims said that he had sold some Rottweiler puppies and had money around the house. (R. Vol. X, p. 1313). Sims said that the last litter was born in July of 1989 and that he had sold them by September of 1989. (R. Vol. X, pp. 1313-1314). Sims related that he worked and that his mother worked an extra job at The Montgomery Advertiser to help him financially. (R. Vol. X, p. 1315). Sims related that his mother would give him $20.00 here and there when she got paid. (R. Vol. X, p.1315, R. Vol. XI, p. 1436). Sims said that he had loaned Eric Johnson about half of what he had. (R. Vol. X, p. 1315). Sims said that after Eric Johnson paid him back he had somewhere in the neighborhood of $800.00. (R. Vol. X, p. 1316). Sims said that he did not give Johnson any

drugs. (R. Vol. X, p. 1316). Sims said that he walked outside to the edge of the patio with Johnson and that he could see someone in the car outside. (R. Vol. X, pp. 1316-1317). Sims said that he did not know who was in the car. (R. Vol. X, p. 1317). Sims related that when Johnson opened the door, he saw two people inside of the car. (R. Vol. X, p. 1317). Sims said he had not seen them before. (R. Vol. X, p. 1317). Sims denied saying anything to Moore about four ounces of cocaine. (R. Vol. X, p. 1318). Sims said he said "hi, how ya'll doing,' and walked back inside. (R. Vol. X, p. 1318). Sims said that after they left, he went back inside, talked with Sharon Lampley for a while, and called his wife at work. (R. Vol. X, p. 1321). Sims said that he and his wife talked about going out and buying

a suit. (R. Vol. X, pp. 1321-1322).

Sims said he kept the money in his bedroom closet. (R. Vol. X, p. 1319). Sims denied having any drugs, drug residue, drug paraphernalia, weights, scales, or plastic sacks in his house. (R. Vol. X, pp. 1319, 1320). Sims also testified that he did not allow people to use drugs in his house. (R. Vol. X, pp. 1320-1321).

Sims said that he got some of the money out of the closet after Johnson left. (R. Vol. XI, p. 1475). Sims said that he then picked up his wife, who was pregnant at the time, and took her to the doctor's office for an appointment. (R. Vol. X, p. 1323). Sims said they were at the doctor's office about 30-45 minutes. (R. Vol. X, p. 1323). Sims said that after leaving the doctor's office, they

started to go home but that his wife said that she was not ready to go home. (R. Vol. X, p. 1324). Sims acknowledged that when he saw the car it crossed his mind that they might be coming to get him. (R. Vol. XI, p. 1481). Sims said they then went downtown. (R. Vol. XI, p. 1324). Sims said that he went into the Looking Good clothing store and that his wife went into a store next door. (R. Vol. X, p. 1324). Sims said that he spent some money in Looking Good. (R. Vol. XI, p. 1477). Sims said that some alterations had to be done on the clothes and that he was told to come back in an hour. (R. Vol. XI, pp. 1479-1480). Sims said that he went back in an hour but that the suit was not ready. (R. Vol. XI, pp. 1480). Sims was crossed examined as to whether he had purchased the suit at

Looking Good that day or a previous day. In the cross examination, Sims was presented with a copy of a sales ticket showing a previous date. However, that sales ticket copy was apparently not connected with Sims and appeared to have been altered in some way. (R. Vol. XI, pp. 1464-1465, 1535-1547). Sims related that when they got home, there were no police cars in front of the house. (R. Vol. X, p. 1325). He said that Bodine pulled in the driveway behind them and that Vice and Narcotics officers came outside and told him to put his hands in the air. (R. Vol. X, p. 1326). Sims related that they patted him down. Upon their request, Sims gave them his car keys and they searched his car. (R. Vol. X, p. 1327). Sims said that he had money on him but that no one searched him at

that time. (R. Vol. X, p. 1329). Sims said that he asked them why they were there, but learned nothing. (R. Vol. X, p. 1329). Sims testified that they did not tell him that any marked money had been found. (R. Vol. X, p. 1330). Sims said that the majority of the money seized from the closet was from the sale of puppies. (R. Vol. XI, p. 1468).

Sims said that the guy from Looking Good delivered the suit to him later that evening. (R. Vol. XI, p. 1464). Sims testified that Bodine transported him to Vice and Narcotics headquarters. (R. Vol. X, p.1336). Sims said that he sat in a chair while Bodine, Martin, and Lay were in an office together. (R. Vol. X, p. 1333). Sims said that Arthur Jones sat on a table beside him. (R. Vol. X, p. 1333). Sims said that he told Simon

that his day was coming because of his conflict with Bodine. (R. Vol. X, p. 1336). Sims said he also did tell Simon that his job performance had gone down. (R. Vol. X, p. 1338). He said that he never told anyone that he was dealing in drugs. (R. Vol. X, pp. 1337, 1340, R. Vol. XI, p. 1550). Sims also denied telling anyone to catch him if they could. (R. Vol. X, p. 1340). He did say that he told Simon that he was in debt and had said that if he had been a big drug dealer he would have had big money and that he may have told Simon that if he were a drug dealer he must be bad at it. (R. Vol. X, pp. 1340, 1341). Sims denied that he was a drug dealer of any kind. (R. Vol. X, p. 1340). Sims said that he told Simon that he had taken his wife to the doctor. (R. Vol. X, p.

1342).

Sims said that Mike Jones and Marty Wooten had given him a ride home. (R. Vol. X, p. 1353). Sims recalled a conversation with them about the investigation and their not being involved in it. (R. Vol. X, p. 1355). Sims did not recall asking Mike Jones and Marty Wooten about a telephone tap and did not recall telling them that he called drug dealers on the telephone. (R. Vol. X, pp. 1355, 1356). Sims also recalled telling Mike Jones and Marty Wooten that he did not sell any drugs. (R. Vol. X, pp. 1355). Sims said that he never told anyone that he was involved in drugs. (R. Vol. X, p. 1355). Sims said that he asked Jones and Wooten about the investigation. (R. Vol. X, p. 1354). Sims related that Bodine proposed that if

he told everything he knew about drugs he might be able to get by with simply resigning from the Montgomery Police Department but that if he did not resign, the case would be presented to the grand jury. (R. Vol. X, pp. 1345, 1347). Sims said that at that time, he had not been quoted as having said anything about Bodine. (R. Vol. X, pp. 1345). Sims also testified that he had been told by Hankins told prior to September 29, 1989 to resign. (R. Vol. XI, p. 1578). Sims said that he did not want to resign because resigning would in his opinion evidence guilt. (R. Vol. X, p. 1347). Sims said he told them that he did not want to resign. (R. Vol. X, p. 1347).

Sims said that he told Bodine he had got the money from a friend. (R. Vol. X, p. 1347). Sims said that he did not give

Bodine a name and that he indicated to Bodine no exact amount of money other than in the hundreds. (R. Vol. X, pp. 1347-1348, R. Vol. XI, p. 1430). Sims said that he did not give Bodine the exact amount because he did not feel like Bodine was being honest with him. (R. Vol. X, pp. 1347-1348). Sims said that he told Bodine about his financial circumstances and that if he were a drug dealer he would not be in a financial bind. (R. Vol. X, pp. 1352, 1353). Sims said that he told Bodine that he had received information that he was being investigated. (R. Vol. X, p. 1350). Sims related that Hankins asked for the names of the officers who told him but that he did not divulge the names because he felt they would be intimidated and fired. (R. Vol. X, p. 1351). Sims

acknowledged that he had not told Bodine the truth. (R. Vol. XI, p. 1434). Sims related that he suspected all but Hankins were involved. (R. Vol. XI, p. 1440). Sims also stated that "[t]alking to Bodine was not like talking to a police officer. It was like talking to a everyday criminal on the street." (R. Vol. XI, p. 1561). Sims related that two days later Chief Wilson told him to give up the names of the officers so that immediate action could be taken against them. (R. Vol. X, p. 1351). Sims said that he did reveal the names to Chief Wilson. (R. Vol. X, p. 1352).

Sims said that he did not give all the details of his information to District Attorney's Investigator Bob Frye because he had not been asked. (R. Vol. X, p. 1380).

Sims said that he was told that the Montgomery Police Department had better not catch him doing any more investigating on anything. (R. Vol. X, p. 1383).

Sims denied telling Simon that Bodine knew he was dealing drugs. (R. Vol. XI, p. 1425). Sims said that he did tell Simon he had financial problems. (R. Vol. XI, p. 1426). Sims did not remember telling Simon he was trying to save $2,000.00 to buy his house. (R. Vol. XI, p. 1426). Sims related that he was actually trying to save $4,500.00 to buy their house. (R. Vol. XI, p. 1428). Sims said that he probably told Simon about the purchase of his Audi automobile. (R. Vol. Xi, p. 1427). Sims also said that he probably told Simon about seeing the white vehicle parked a

few blocks from his house. (R. Vol. XI, p. 1427).

Sims admitted that he told Gantt that Johnson still owed him $200.00. (R. Vol. XI, p. 1482).

Sims said that he did not get his Looking Good receipt back from the police. (R. Vol. XI, p. 1587).

During Sims testimony, the State disclosed for the first time documentary evidence concerning his bank account. The prosecution proceeded to cross examine Appellant Sims' as to various bounced checks. (R. Vol. XI, pp. 1505-1510).

Montgomery Police Officer Cathy Fleming, called in rebuttal by the State, testified that she had not talked with McCord about Sims or Bodine. (R. Vol. XII, p. 1688). She also denied that she

had talked with Sims. (R. Vol. XII, p. 1688).

District Attorney's Office Investigator Robert Frye was asked if he had investigated the allegations made by Sims. (R. Vol. XII, p. 1698). Frye replied that he had and over Appellant's hearsay objection was allowed to state that he was unable to substantiate the allegations. (R. Vol. XII, p. 1699).

James Jackson also denied what Sims had attributed to him. (R. Vol. XIII, p. 1713).

APPENDIX B

Proffered Explanations for Strikes

1. Annie M. Coleman, Black Female, Juror No. 66:

> "She had a larceny second-degree charge according to Criminal Information Justice Center, in 1983; In 1959, she had a fighting and a concealed weapon charge. According to our information from a police officer named Jones the area she lived in, 3657 Oak Street, is well known as a drug area."

(R. Vol V, p. 148)

2. Walter D. Howard, Black Male, Juror No. 10:

> "According to our information when he stood to identify himself, he had a long pause as to where his wife worked and then called the insurance company that he says she now works with by, I believe, the wrong name. Further, he had a criminal conspiracy conviction in 1985, in addition to no driver's license and running red light charges. Two

different officers identified his home, 1656 North Decatur, as being a high drug -- high crime area. He further said in individual voir dire that he had heard about this case and that the defendant was accused of selling out of his apartment. That is incorrect. Therefore, we're not sure he remembered well what he had heard."

(R. Vol. V, p. 148-149).

3. Mary E. Pettus, Black Female, Juror No. 107:

"She likewise lived in a high drug area, the same address as Mr. Howard that we had, 1656 North Decatur. Two officers identified that to us as high drug crime area as well as this attorney knew that. She further had charges of fighting and possessing untaxed whiskey. When questioned by the Court, she had difficulty in individual voir dire, understanding the Court's and prosecutor's questions. She said that she knew something --She raised her hand and said she knew something and was then put with the group to be brought in individually. When the Court brought her in she said she did not know anything. And she said something about -- and it did

not make sense to this attorney -- not calling her name. We were very afraid that she did not understand enough about what was going on to follow the Court's directions and follow what we believe to be lengthy testimony."

(R. Vol. V, pp. 149-151).

4. I.V. Shelby, , Black Female, Juror No. 26:

"Her particular address of 303 West Patton Avenue, a police officer remembered answering a call there. Further it is in a known drug area. According to another officer we show a charge of theft of property in the third degree in 1986 in Montgomery City Court, She further in individual voir dire indicated all she could remember about the case was something about Mr. Sims, the defendant, had come too close to some people. As you know, that was some of the defense that he was set up because of knowledge he had, and that's all she remembered. We were afraid that would tend to cause her to be for the defense. She had a fixed -- at one point she said she did have a fixed opinion that he was innocent and it was only with lengthy

> questioning by the Court that she was able to say that she would -- it was not fixed. She, in fact, interrupted the Court at one point when you were attempting to question her about the case."

(R. Vol. V, pp. 150-152).

5. Phyllis L. Simpson, Black Female, Juror No. 20: "Our information there was at her address on Williams Street, the police had answered a specific call there. Further when asked by the -- the defense questioned whether or not she had received any tickets that she felt was unjust, she said yes, she had." (R. Vol V, p. 152).

6. Johnnie M. Miller, Black Female, Juror No. 81: "Ms. Miller lived on Early Street where the police had answered a call, and this particular neighborhood has been identified as a high crime area, in particular, drugs." (R. Vol V, pp. 152-153).

7. Alfred S. Jones, Black Male, Juror No. 44:

> "According to our record and to my observation, Mr. Jones came into Court wearing jeans, very casually dressed. He stated that -- to the Court's question that he had seen this on TV only one time, and that -- just that it was going on. He was extremely vague. I asked him again what he remembered. He was again vague. And then he divulged that, well, in fact, he saw it not once but twice, including last night, something about a trial. We considered that to be a deception to the Court and prosecution that he did not reveal his full knowledge of this case to the Court. In addition he had a speeding, running a red light, and running a red light charges in 1985, 6, and '88. He's twenty-three years of age as well."

(R. Vol V, pp. 152-154).

8. Hester Webb, Black Female, Juror No. 25:

> "Our information there -- and I personally observed Ms. Webb in Court chewing gum, not only during individual voir dire but

> during the general voir dire she was extremely soft spoken, and it was extremely difficult for me to hear. She was very hesitant in her responses to the question, in particular to a question I asked about what she had heard and what was her opinion about any prior proceeding. My opinion was that she did not want to discuss that, and perhaps had further knowledge that she did not divulge. This case is very complicated and will require close attention and understanding of some very what we think were very subtle differences in the case about whether or not someone's involvement in the case and their involvement in any audit or other activity is relevant."

(R. Vol V, pp. 154-155). 9. Rosa C. Bush, Black Female, Juror No. 19: "Ms. Bush 's attitude appeared to be extremely sad. I was concerned about her desire to be of service. The trial court asked: "She was what?" The prosecutor answered: "Sad. She has a very depressed look about her face. Further, Officer Jones has

identified her home area at Riviera Road as being that of a high crime area, in particular drugs." (R. Vol V, p. 155)

10. John A. Brown, Juror No. 87, White Male:

> "Again, his address was of Clayton Street. He was identified as living in a high crime area by Officer Jones. He stated that he had gone through the sixth grade in education. This will require -- this trial will require the reading -- ... The Case will require the jurors to review documents and determine their validity. We anticipate the defense will again present some blown-up documents, point to things, put numbers in front of them. Also, if my recollection -- and I made a note -- when he stood, I believe he wasn't very aware of the courtroom. He sounded and looked elderly. This case will take several days to try. The jury will be sequestered. We were concerned about his ability to function for that period of time."

(R. Vol V, pp. 155-157)

11. John D. Carter, Juror No. 94,

Black Male:

> "Mr. Carter worked for the ABC Board. This district attorney's office has had a lengthy investigation of the ABC Board. In fact, it resulted in a successful prosecution of at least two people that we're aware of, Mr. Lieberman having been involved in one of those prosecutions personally. Further, the area he lives in of Upton Road, has been identified to us as an extremely high crime area, being a drug area. And lastly, he indicated he was a friend of and had worked extensively in the campaign of Mr. Mark Gilmore. Mr. Gilmore is a friend of mine; however, Mr. Gilmore, based on my personal knowledge, has attempted to speak with our office in asking this office to drop this case and has expressed a personal opinion about this case. I do not know; but I feared that Mr. Carter might be aware of Mr. Gilmore's personal and obviously strong feelings in this case."

(R. Vol. V, pp. 157-158).

12. Sylvene S. Jackson, Juror No. 6, Black Female:

"Ms. Jackson indicated she was a cosmetologist, but did not tell us where she worked. She has a speeding and improper turn, the speeding in '89,the turn in '86. She also was the only other person I observed who wore jeans to Court, extremely casually dressed. Further, her individual comments about what she observed, according to my notes, were to the effect 'I saw it on TV and he's going up against the police department and he was claiming it was a set up.' She said nothing to indicate that he had been arrested or that half of the jury had felt that he was guilty. And her only comments were to the effect that he might not be guilty."

(R. Vol V, pp. 158-159).

13. Samuel Smith, Juror No. 112, Black Male:

"Mr. Smith -- remember the court towards the very end asked the entire jury voir dire about cocaine, whether or not it should be legalized and drugs should not be legalized. He then asked the jurors, does anybody believe that cocaine is habit-forming. Then, a huge number of people raised their

hands. I happened to be observing the front row in particular. I'm very short, and that is the easiest for me to see. And, I noticed Mr. Smith, who was sitting here towards the front, did not raise his hand. Then the Court, realizing it was far too many people to question individually to get their names, said, well, is there anybody who thinks it's not habit forming? He did not raise his hand. He did not participate. I was concerned that he didn't think cocaine was habit-forming since the overwhelming scientific evidence is that it is, and there have been numerous articles about it. Also, I was concerned that he didn't participate in the question. He didn't answer if one way or the other. And lastly, he did not express any knowledge of this case, which surprised me, based on his educational background, his employment and that of his wife."

(R. Vol. V, pp. 159-160).

14. Isralean Chambers, Juror No. 75, Black Female: "Ms. Chambers indicated -- or did not indicate that she had heard anything about the case. She came to court, and the best judgment I can make,

Your Honor, she sat towards the middle rear area. She had glasses on. They appeared to be darkly tinted. I could not tell if it was for medicinal reasons or if it was because she had worn sunglasses in the courtroom. Because of the numerous exhibits and documents, blow-ups, and other things, I could not take a chance on whether or not she had a vision problem, or contrary to most people, wore sunglasses indoors." (R. pp. 160-161).

15. Nancy Moseley, Juror No. 46, White Female:

> "We struck her because she indicated she had heard about the mistrial, and specifically, she said she heard the vote was eleven to one, which was contrary to what the State's information was, although that was publicized. And because she did not -- she obviously thought it was extremely close to a unanimous decision, we were extremely worried that she might be swayed by that. She further said her son had an unfortunate experience with the police department. We did not strike her sooner than that because it was apparent to us, and it was the pattern of the defense, to strike all whites. Every one of their strikes -- all eighteen -- were critical of the white race, and we thought they might strike her. And when it became apparent to us at

about number fifteen they may not, we chose to. rather than risk it, make that strike. Defense then struck a white female."

16. Rose H. Robinson, Juror No. 8, Black Female: "She indicated, when asked, the defense questioned if she had received an unjust ticket. We don't know anymore about her than that, but fearing that she might be prejudiced against the police department, we struck her." (R. Vol. V. pp. 162).

17. Janice Waites, Juror No. 30, Black Female: "Among the reasons there were that she also raised her hand that she had received an unjust ticket. Further, she indicated she knew Mr. --I believe -- DeBardelaben. It was one of the attorneys associated with the defense attorneys." (R. Vol. V, p. 163)

18. James Shaw, Juror No. 93, White

Male:

> "You might recall Mr. Shaw, Your Honor. He was the attorney who actively campaigned in Gorman Houston's campaign. He, too, indicated he had received an unjust ticket, and that was our concern there. However, he was obviously well educated. and we had a long discussion about whether or not having an attorney on the jury would be helpful or hurtful or neutral in this trial. But because of the ticket, we felt we should go ahead and strike him. Likewise, we saved him towards the end in addition because the defense pattern in striking was to strike white males."

(R. Vol. V, pp. 163-164).

Miss Brooks went on saying:

> "We had several others that we had hoped to strike that we did not get to. Our pattern basically, Your Honor, was to get rid of those with criminal histories, in the drug areas, who individually answered things that were confusing to us or of strong concern to us otherwise in individual voir dire. We also based it on the pattern the defense had of striking is they clearly were

striking members of the white race that we felt that those we were concerned about could be held till near the end in the hopes that they would strike some and allow us to strike more people we wanted to get off the jury. We also were trying to protect certain jurors and get them on the jury; in particular, number 16 who is a juror, Ms. Mordean, who is a black female. She is the mother of a police officer that I know, I think is a good officer, and I felt she would make a good juror. Specifically, we were trying to keep on the jury number 51 and did, who indicated she had heard about the marked money. Juror number 52 we wanted to protect. She knew Chief Swindall, former police chief of Montgomery, who is obviously a law enforcement figure, and we felt like she would give the police department a fair shake. Number 54 is an employee of the Montgomery County Commission, and obviously our office is closely associated with the Commission. Number 58 is apparently a physician. He's a radiologist, and we felt his educational background could be helpful to the jury. Number 69 is a black female, who we're not trying to protect her in any sense because we don't know a whole lot about her. We just

simply had no reason to strike her. Number 78, you might recall, was the lady who was from Illinois who had the physical education background, and her husband was likewise a teacher. She seemed to be a forceful person. When she stood and answered, she had a strong voice. In fact, was one of the easiest to understand, in my opinion. Number 79, we weren't particularly trying to protect. I was surprised she wasn't struck by the defense, frankly. Number 88 indicated that she knew some police officers, and we had hoped that would be a positive experience for her. Number 89 was one we had a real discussion about. That's the fire inspector, Judge. You might remember him. First, he said he had no opinion, and then he said, well, he thought he might be not guilty because of some experience with the police department. And he was in our list of probable strikes. We thought about it, but I had known Mr. Deaton professionally now for probably ten years, and I believe him to be the kind of person who will give the State of Alabama, as well as the defendant, a fair shake. And I think that he will weigh carefully the evidence in the case. And when he said he

would do that, I took him at his word since I knew of him personally and professionally. The method in which we struck, Your Honor, was to discuss, this case between Mr. Leiberman and myself, reviewing the information that we had jointly, sharing our opinions. And I hope I have done a good job of articulating his reasons for striking. We had at our disposal, Your Honor, not only the information from -- oh, I would tell the Court, too, that no juror who remains on the jury did we have any information on that he or she had had a call at their home or lived in a high crime area or lived in a drug area, nor did anyone who remains on the jury, to our knowledge, answer positively they had an unfortunate experience or what they thought was an unjust ticket in this case. We had at our disposal criminal histories from not only the district attorney's office but Public Safety, CJIS, district court, city court. We circulated the average sheet to members of our staff, which is some approximately fifty people. We tried to find prior jury service on any of those. We weren't very successful with that. We also circulated it among the narcotics office in the Montgomery Police

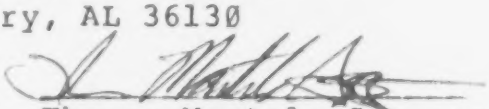
Department as a whole for records and other comments about those people. We likewise had the home addresses, the occupation of the juror and the spouse, and age of each of the jurors."

(R. Vol. V, pp. 165-169).

CERTIFICATE OF SERVICE

I, Thomas Martele Goggans, a member of the Bar of the Supreme Court of the United States of America and the attorney for Respondent Brad Haywood Sims, hereby certify that on this 25th day of January, 1992, I did serve the requisite number of copies of the foregoing upon the attorneys for the Petitioner by mailing the same to the attorneys first class postage prepaid and addressed as follows:

James H. Evans
Attorney General
Joseph G. L. Marston, III
Assistant Attorney General
Office of the Attorney General
11 South Union Street
Montgomery, AL 36130



Thomas Martele Goggans
P.O. Box 1307
Montgomery, AL 36101
(205)-834-2511

Attorney for Respondent
Brad Haywood Sims